280 N.C. App.—No. 3 Pages 301-371

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 27, 2022

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OF

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[1]Resigned 19 November 2021.
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COURT OF APPEALS

CASES REPORTED

FILED 16 NOVEMBER 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Interlocutory order—petition for writ of certiorari—requirements for transfer to three-judge panel—issue of significance—The Court of Appeals granted defendant's petition for writ of certiorari to review an interlocutory order transferring defendant's motion to dismiss a civil case to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1). Defendant raised a significant issue with potential merit regarding whether the transfer of his motion, which challenged the constitutionality of recently-enacted N.C.G.S. § 1-17(e) (a statute that allowed plaintiffs to bring a civil action related to sexual offenses that occurred twenty years earlier), was appropriate. **Cryan v. Nat'l Council of Young Men's Christian Ass'ns of the U.S.A., 309.**

Interlocutory order—substantial right—challenge to legislative act—transfer of case to three-judge panel—Where the trial court transferred defendant's motion to dismiss that challenged the constitutionality of recently-enacted N.C.G.S. § 1-17(e) (a statute that allowed plaintiffs to bring a civil action related to sexual

offenses that occurred twenty years earlier) to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1), the transfer affected subject matter jurisdiction and not venue as asserted by defendant. Therefore, the interlocutory order transferring the matter did not affect a substantial right and was not immediately reviewable. **Cryan v. Nat'l Council of Young Men's Christian Ass'ns of the U.S.A., 309.**

Nonjurisdictional appellate rule—noncompliance—substantial and gross—dismissal warranted—In an appeal from a child support order, the parties' inclusion of unredacted confidential information—including the parties' social security numbers, bank account numbers, credit card numbers, and employer identification numbers, as well as their three minor children's social security numbers—in defendant's opening brief and in certain Rule 9(d) documentary exhibits constituted a substantial failure and gross violation of Appellate Rule 42(e), a nonjurisdictional rule. Consequently, the Court of Appeals dismissed the appeal and taxed double costs to the parties' attorneys, with each attorney being liable for one-half of the costs, and declined to invoke Appellate Rule 2 to reach the merits of the appeal. **Mughal v. Mesbahi, 338.**

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Child support action—terms of parties' separation agreement—controlling—In a child support action, where the parties' private, unincorporated separation agreement (which resolved issues of child custody, child support, and attorney fees between the parties) specifically stated that the prevailing party in any civil action brought to enforce the agreement would be entitled to attorney fees, the trial court properly awarded fees to the mother who prevailed in her claim for breach of contract, and not to the father for his attempt to modify the agreement. **Jackson v. Jackson, 325.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning—ceasing reunification efforts—required statutory findings—After a 2019 amendment to N.C.G.S. § 7B-906.2(b), the trial court in a neglect and dependency case was not required to enter findings showing that reunification efforts clearly would be unsuccessful or inconsistent with the child's health or safety before removing reunification with respondent-father as a concurrent plan, where the primary permanent plan of guardianship had already been achieved. Nevertheless, the court's permanency planning order awarding guardianship to the child's foster parents was vacated and remanded because the court failed to make the required findings of fact regarding the statutory factors under section 7B-906.2(d) to support ceasing reunification efforts. **In re A.C., 301.**

Permanency planning—guardianship to nonparents—constitutionally protected parental status—evidentiary standard—A permanency planning order awarding guardianship to the child's foster parents in a neglect and dependency case was vacated and remanded because the trial court failed to apply the proper evidentiary standard when concluding that respondent-father acted inconsistently with his constitutionally protected status as a parent, stating that the supporting findings of fact were based on "sufficient and competent evidence" rather than "clear and convincing evidence." **In re A.C., 301.**

media posts were not stale even though they had no dates or times on them, because the items to be seized included ones that had enduring utility to defendant. **State v. Kochetkov, 351.**

N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

IN RE A.C.

[280 N.C. App. 301, 2021-NCCOA-280]

IN THE MATTER OF A.C.

No. COA20-508

Filed 16 November 2021

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparents—constitutionally protected parental status—evidentiary standard

A permanency planning order awarding guardianship to the child's foster parents in a neglect and dependency case was vacated and remanded because the trial court failed to apply the proper evidentiary standard when concluding that respondent-father acted inconsistently with his constitutionally protected status as a parent, stating that the supporting findings of fact were based on "sufficient and competent evidence" rather than "clear and convincing evidence."

2. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—required statutory findings

After a 2019 amendment to N.C.G.S. § 7B-906.2(b), the trial court in a neglect and dependency case was not required to enter findings showing that reunification efforts clearly would be unsuccessful or inconsistent with the child's health or safety before removing reunification with respondent-father as a concurrent plan, where the primary permanent plan of guardianship had already been achieved. Nevertheless, the court's permanency planning order awarding guardianship to the child's foster parents was vacated and remanded because the court failed to make the required findings of fact regarding the statutory factors under section 7B-906.2(d) to support ceasing reunification efforts.

Appeal by respondent-father from order entered 13 November 2019 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 9 March 2021.

Jennifer G. Cooke for petitioner-appellee New Hanover County Department of Social Services.

Benjamin J. Kull for respondent-appellant father.

Administrative Office of the Courts, by Guardian Ad Litem Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

GORE, Judge.

¶ 1 Respondent-father appeals from an Order concluding he acted inconsistently with his constitutional rights as a parent and granting guardianship of the juvenile to the juvenile's foster parents. Because the trial court erred by applying an improper evidentiary standard and failed to make the statutorily required findings before ceasing reunification efforts toward guardianship, we vacate and remand for a new permanency planning hearing.

I. Background

¶ 2 In its Order on Adjudication and Disposition filed 29 April 2016 ("April 2016 Order"), the trial court adjudicated the juvenile ("Andy")[1] dependent and neglected as defined by N.C. Gen. Stat. §§ 7B-101(9) and (15) based on "the stipulation of the Respondent-Parents, Guardian ad Litem ("GAL") and [New Hanover County Department of Social Services]." N.C. Gen. Stat. §§ 7B-101(9), (15) (2019). Subsequently, respondent-mother voluntarily relinquished her rights, and respondent-father's parental rights were involuntarily terminated in the trial court's Order Terminating Parental Rights filed 11 October 2017 ("October 2017 Order").

¶ 3 Respondent-father appealed the judicial termination of his parental rights. This Court vacated the October 2017 Order due to service deficiencies in an opinion filed on 5 June 2018. *In re A.J.C.*, 259 N.C. App. 804, 817 S.E.2d 475 (2018). Respondent-mother subsequently revoked her voluntary relinquishment of her parental rights. In the Subsequent Permanency Planning Hearing Order filed 15 October 2018 ("October 2018 Order"), the trial court found respondent-father was eagerly pursuing reunification with Andy and had participated in a residential substance abuse treatment program, despite not producing records or signing releases to show his case plan progress. Andy remained in foster care and had been diagnosed with many mental health conditions. In the October 2018 Order, the trial court changed the permanent plan from adoption to a permanent plan of "guardianship with a court approved caretaker with a concurrent plan of reunification."

¶ 4 In its Subsequent Permanency Planning Hearing Order filed 30 April 2019, the trial court found respondent-father continued to cooperate with DSS, receive substance abuse treatment and pass drug tests, maintain safe and appropriate housing, and to attain adequate finances. However,

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1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

the trial court subsequently reviewed a GAL September 2019 report indicating that respondent-father's therapy had not resulted in him modifying his behavior regarding boundaries, consistent action regarding Andy, and displays of physical affection that made Andy uncomfortable. The trial court also considered the following corresponding testimony from a counselor, psychologist, DSS employee, and respondent-father at the 26 September 2019 permanency planning hearing: Andy had negative reactions after visits with respondent-father; respondent-father tested positive for a prescribed medication only once, suggesting he may not have been taking his prescription medications; instances where respondent-father did not adequately supervise Andy during visits; respondent-father was not aware of the medication Andy was taking despite attending doctor visits; respondent-father blamed the foster parents and DSS for Andy's mental health concerns; and respondent-father did not pay attention to the doctor at a doctor's appointment for Andy.

¶ 5 During the 26 September 2019 permanency planning hearing, respondent-father did not raise the issue of his constitutionally protected status as a parent. Respondent-father also did not object to arguments that he had acted contrary to his constitutionally protected status as a parent, or the trial court's award of guardianship to the foster parents. In closing arguments, respondent-father's attorney asked the trial court "to deny the guardianship today[,] . . . [grant] extended visitation to start off at two times a week[,] . . . [and] start family therapy . . . addressing issues related to reunification."

¶ 6 In its final remarks and oral order at the 26 September 2019 permanency planning hearing, the trial court did not specifically mention respondent-father's constitutionally protected parental status, but specifically granted guardianship to the foster parents. The trial court's final remarks and oral order came immediately after the DSS attorney's closing, where she repeatedly argued respondent-father had acted inconsistently with his constitutionally protected right as a parent and guardianship was appropriate.

¶ 7 In its Juvenile Order filed 9 October 2019, the trial court granted guardianship to the foster parents. In its Subsequent Permanency Planning Hearing Order filed 13 November 2019 ("November 2019 Order"), the trial court determined respondent-mother and respondent-father had "acted inconsistently with their constitutional rights to parent" and that "it is in [Andy's] best interest and welfare for guardianship to be granted to [the foster parents]." The trial court made the findings of fact in the November 2019 Order "by sufficient and competent evidence."

¶ 8 Respondent-father appeals the November 2019 Order and argues (1) the trial court applied the incorrect evidentiary standard in its conclusion he acted inconsistently with his constitutional right to parent Andy; (2) even if the trial court applied the correct evidentiary standard in reaching that conclusion, the findings do not support the conclusion; and (3) the findings do not support the trial court's "conclusion that reunification efforts clearly would be unsuccessful or inconsistent with [Andy's] health or safety."

¶ 9 The GAL and DSS argue respondent-father waived appellate review of the trial court's finding he acted inconsistently with his constitutionally protected status as a parent because he did not object on that basis, raise the issue before the trial court, or present any evidence regarding his constitutionally protected parental status. Further, the GAL admits "the [November 2019 Order] mistakenly states that the trial court applied a 'sufficient and competent' standard to the evidence in making its findings of fact rather than the required 'clear and convincing' standard," but DSS and the GAL portray the mistake as harmless.

II. Evidentiary Standard

¶ 10 **[1]** Respondent-father first argues that the trial court failed to apply the proper evidentiary standard when concluding that respondent-father acted inconsistently with his constitutionally protected parental status. Respondent-father asserts the trial court erred by stating in its order that all findings of fact were based on "sufficient and competent evidence" as opposed to clear and convincing evidence.

¶ 11 "Findings in support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence." *In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017) (citing *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001)). Our Supreme Court has held that when a trial court fails to apply the clear and convincing evidence standard when making findings of fact in support of a conclusion that a parent has acted inconsistently with their constitutionally protected status, the case "must be remanded for findings of fact consistent with this standard of evidence." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753-54 (2005).

¶ 12 DSS concedes that the written order lists the wrong standard of evidence. However, DSS argues the error was harmless and the trial court nonetheless applied the proper standard in making the findings. DSS cites no authority for this argument, nor points to any evidence the trial

court applied the proper standard. Similarly, the GAL argues the error was harmless as a mere drafting error and because the order and the evidence satisfy the correct standard, we should not vacate the order. The GAL relied on a footnote found in *In re Pope* to make this argument. 144 N.C. App. 32, 38, n.4, 547 S.E.2d 153, 157, n.4, *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001). However, *In re Pope* involves the termination of parental rights, for which the legal standard is whether there is a probability of repetition of neglect. N.C. Gen. Stat. § 7B-1111(a)(1) (2019). The analysis in *In re Pope* is not controlling because it involves a different standard than the case *sub judice*.

¶ 13 Here, the trial court did not state the standard used in its oral ruling. The trial court's written order states, "the Court makes the following FINDINGS OF FACT by *sufficient and competent evidence*." Based on the record, we cannot conclude the trial court applied the proper clear and convincing evidence standard and thus remand for findings of fact consistent with the proper standard of evidence.

III. Constitutionally Protected Parental Status

¶ 14 Respondent-father argues the trial court erred because the findings do not support the conclusion that he acted inconsistently with his constitutionally protected parental status. Respondent-father asserts that several of the trial court's findings instead acknowledge his progress, participation, involvement, and availability in Andy's life. Respondent-father also contends that in other findings the trial court misconstrued the evidence and the evidence does not support the findings of fact.

¶ 15 "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N.*, 359 N.C. at 307, 608 S.E.2d at 753 (2005). "[T]he decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (2001) (citation omitted).

¶ 16 "This Court reviews the conclusion of whether a parent has acted inconsistently with her constitutionally protected rights de novo and to determine whether it is supported by clear and convincing evidence." *In re B.R.W. & B.G.W.*, 2021-NCCOA-343, ¶ 34 (cleaned up).

¶ 17 This Court has issued conflicting rulings on the issue of appellate review of conclusions that a parent has acted inconsistently with their constitutionally protected status. Often panels sitting mere weeks apart have issued opinions taking diverging lines of analysis on this issue. *See In re B.R.W. & B.G.W.*, 2021-NCCOA-343, ¶¶ 36-41; *In re N.Z.B.*, 2021-NCCOA-345, ¶¶ 16-22; *In re M.F.*, 2021-NCCOA-368, ¶¶ 22-23. This Court would benefit from the guidance of our Supreme Court concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court. However, until our Supreme Court provides much needed clarity, we must proceed and evaluate the cases before us despite conflicting and divergent precedent.

¶ 18 In the case *sub judice*, we decline to address the conflicting analyses in this Court's precedent, because the disposition in the present case is unaffected by the line of analysis utilized.

IV. Reunification Efforts

¶ 19 **[2]** Respondent-father argues the trial court erred in ceasing reunification efforts because the findings do not support the conclusion that reunification efforts clearly would be unsuccessful or inconsistent with Andy's health or safety.

¶ 20 At a permanency planning hearing a trial court must adopt reunification as either a primary or secondary permanent plan unless the requirements of N.C. Gen. Stat. § 7B-906.2(b) are met. Respondent-father argues we should apply the version of § 7B-906.2(b) before the statute's 2019 amendment, because the amendment went into effect on 1 October 2019 and the permanency planning hearing in the case *sub judice* was held on 26 and 30 September 2019, before the amendment went into effect.

¶ 21 Under the version of the statute in effect as of the hearing dates, reunification efforts did not automatically cease upon the achievement of the permanent plan. Respondent-father requested the trial court order family therapy and a trial home placement as part of continuing reunification efforts.

¶ 22 The GAL and DSS argue the amended version of the statute applies. We agree.

¶ 23 "Pending" is defined as "[r]emaining undecided [or] awaiting decision." *In re E.M.*, 249 N.C. App. 44, 51, 790 S.E.2d 863, 870 (2016) (citing *Pending*, Black's Law Dictionary (9th ed. 2009)). *In re E.M.*, involved the same determination of the applicability of requirements from an

amendment to § 7B-906.2(b) as the present case. In *In re E.M.*, this Court concluded the case was no longer pending because the trial court announced its decision to cease reunification efforts at the conclusion of the permanency planning hearing. *Id.* In contrast, while the trial court in the case *sub judice* did announce its award of guardianship at the conclusion of the permanency planning hearing, it did not announce a decision as to reunification efforts. Thus, we conclude the matter remained pending until the order was entered on 13 November 2019, and the 2019 amendment to § 7B-906.2(b) is applicable.

¶ 24 Section 7B-906.2(b), following the 2019 amendment provides:

> At the permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing. *Unless permanence has been achieved*, the court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b) (2019) (emphasis added). Following the 2019 amendment, findings that reunification clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety are required to cease reunification (*i.e.*, remove reunification as a primary or secondary plan), but are not required if the permanent plan has already been achieved.

¶ 25 The parties' arguments over which version of the statute is applicable is irrelevant. Neither permanent plan could have been achieved until the entry of the court's orders of 9 October 2021 and 13 November 2021.

¶ 26 At every permanency planning hearing, the court shall identify the primary and secondary plan and unless permanence has been achieved,

the court shall order DSS to make efforts towards finalizing both the primary and secondary plans, which here includes reunification. Until entry of the court's permanency planning order, DSS was under the obligation to continue reunification efforts as reunification was one of the two required plans.

¶ 27 Here, Andy's permanent plan of guardianship with his foster parents was not achieved until after the permanency planning hearing subject to this appeal. The court orally announced its intention to award guardianship at the conclusion of the 30 September 2019 hearing. It entered its order awarding legal guardianship to the foster parents on 9 October 2019. DSS' strategic submission of one order ahead of another order does not remove the court's statutory obligation to take evidence and make written findings of fact by clear and convincing evidence of the four statutory factors required before ceasing reunification efforts with respondent-father. N.C. Gen. Stat. § 7B-906.2(b).

¶ 28 We vacate and remand for a new permanency planning hearing to apply all appropriate evidentiary standards. Upon remand if the trial court wishes to remove reunification as a permanent plan, the trial court is bound by statute to make all four findings consistent with N.C. Gen. Stat. § 7B-906.2(d). S*ee In re A.W.*, 2021-NCCOA-182, ¶ 42 (holding to cease reunification the trial court must make the statutorily required findings of fact related to whether parent demonstrated degree of failure necessary to support ceasing reunification efforts).

V. Conclusion

¶ 29 The trial court failed to apply the proper evidentiary standard in making findings of fact to support its conclusion that respondent-father acted inconsistently with his constitutionally protected status as a parent. The court failed to make findings of fact to support its order which ceased reunification efforts and awarded guardianship to foster parents. Thus, we must vacate the 12 November 2019 order and remand for a new permanency planning hearing consistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

CRYAN v. NAT'L COUNCIL OF YOUNG MEN'S CHRISTIAN ASS'NS OF THE U.S.A.

[280 N.C. App. 309, 2021-NCCOA-612]

JOSEPH CRYAN, SAMUEL CRYAN, KERRY HELTON, THOMAS HOLE, RICKEY HUFFMAN, JOSEPH PEREZ, JOSHUA SIZEMORE, DUSTIN SPRINKLE, AND MICHAEL TAYLOR, PLAINTIFFS

v.

NATIONAL COUNCIL OF YOUNG MEN'S CHRISTIAN ASSOCIATIONS OF THE UNITED STATES OF AMERICA; YOUNG MEN'S CHRISTIAN ASSOCIATION OF NORTHWEST NORTH CAROLINA D/B/A KERNERSVILLE FAMILY YMCA AND MICHAEL TODD PEGRAM, RESPONDENT

No. COA20-696

Filed 16 November 2021

1. Appeal and Error—interlocutory order—substantial right—challenge to legislative act—transfer of case to three-judge panel

Where the trial court transferred defendant's motion to dismiss that challenged the constitutionality of recently-enacted N.C.G.S. § 1-17(e) (a statute that allowed plaintiffs to bring a civil action related to sexual offenses that occurred twenty years earlier) to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1), the transfer affected subject matter jurisdiction and not venue as asserted by defendant. Therefore, the interlocutory order transferring the matter did not affect a substantial right and was not immediately reviewable.

2. Appeal and Error—interlocutory order—petition for writ of certiorari—requirements for transfer to three-judge panel—issue of significance

The Court of Appeals granted defendant's petition for writ of certiorari to review an interlocutory order transferring defendant's motion to dismiss a civil case to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1). Defendant raised a significant issue with potential merit regarding whether the transfer of his motion, which challenged the constitutionality of recently-enacted N.C.G.S. § 1-17(e) (a statute that allowed plaintiffs to bring a civil action related to sexual offenses that occurred twenty years earlier), was appropriate.

3. Constitutional Law—North Carolina—challenge to legislative act—transfer to three-judge panel—not a valid facial challenge

The trial court erred by transferring defendant's motion to dismiss to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1) because the motion—which challenged the recently-enacted statute,

N.C.G.S. § 1-17(e), under which plaintiffs brought a civil action relating to sexual offenses that occurred twenty years earlier—did not raise a facial constitutional challenge but an as-applied challenge, and plaintiffs did not raise a facial challenge of their own in their motion to transfer.

Judge CARPENTER dissenting.

Appeal by respondent from order entered 22 July 2020 by the Honorable Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 26 May 2021.

Lanier Law Group, P.A., by Donald S. Higley, II, for Petitioner-Appellee.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, for Respondent-Appellant.

GORE, Judge.

¶ 1 The claims in the present matter arise from acts of sexual abuse by Defendant Pegram, while he was employed by the YMCA, on Plaintiffs, who were minors at the time of the abuse. The last act of sexual abuse by Pegram occurred approximately twenty years ago.

¶ 2 Based on Plaintiffs' allegations, all claims became time-barred in 2015 under the then-applicable statute of limitations. The youngest Plaintiff turned 18 years of age in 2005. The longest limitations period for any of the claims was ten years. Accordingly, all claims in this action became time-barred by 2015.

¶ 3 Four years later, though, in 2019, our General Assembly enacted Section 1-17(e), which allows a person who was a victim of sexual abuse when (s)he was a minor to bring an action for claims "related to [the] sexual abuse" "within two years of the date of a criminal conviction" of the perpetrator of the sexual abuse. N.C. Gen. Stat. § 1-17(e) (2020). Here, the Complaint alleges that the perpetrator, Defendant Pegram, was convicted of various sex offenses. Defendant challenges the constitutionality of Section 1-17(e) which was enacted in 2019. And Plaintiffs commenced their previous time-barred claims in 2020, within two years of Pegram's conviction pursuant to Section 1-17(e).

I. Factual & Procedural Background

¶ 4 This is a case in which multiple victims allege they were sexually assaulted by Michael Todd Pegram ("Pegram") while he worked as an employee of Defendant-Appellant Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA ("YMCA" or "Defendant"). In 2019, Pegram was convicted for those crimes. On 14 February 2020, Plaintiffs-Appellees Joseph Cryan, Samuel Cryan, Kerry Helton, Thomas Hole, Rickey Huffman, Joseph Perez, and Michael Taylor (collectively, "Plaintiffs") filed a complaint seeking compensatory and punitive damages from Defendant for assault, battery, negligent hiring retention and supervision of Pegram, negligent infliction of emotional distress, and intentional infliction of emotional distress.

¶ 5 On 1 June 2020, Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the basis that Plaintiffs' claims are time barred because the North Carolina General Assembly's amendments to N.C. Gen. Stat. § 1-17(e) (2019) and N.C. Gen. Stat. § 1-52(5), (16) and (19) (2019) (collectively "2019 amendments") were in violation of the North Carolina Constitution. *See* SAFE Child Act, N.C. Session Law 2019-245, S.B. 199 (2019). N.C. Gen. Stat. § 1-17(e) states:

> (e) Notwithstanding the provisions of subsections (a), (b), (c), and (d) of this section, a plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age.

N.C. Gen. Stat. § 1-17(e).

¶ 6 On 18 June 2020, Plaintiffs filed a motion pursuant to N.C. R. Civ. P. 42(b)(4) and N.C. Gen. Stat. § 1-267.1(a1) to transfer Defendant's motion to dismiss to the Wake County Superior Court for the appointment of a three-judge panel to determine the constitutionality of the amendments. N.C. Gen. Stat. § 1-267.1(a1) states:

> (a1) Except as otherwise provided in subsection (a) of this section, any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court

> of Wake County, organized as provided by subsection (b2) of this section.

¶ 7 N.C. Gen. Stat. § 1-267.1(a1) (2019). N.C. R. Civ. P. 42(b)(4) further provides:

> (b) Separate trials
>
> . . .
>
> (4) Pursuant to G.S. 1-267.1, *any facial challenge to the validity of an act of the General Assembly*, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County *if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading*. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court

> in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. R. Civ. P. 42(b)(4) (2019) (emphasis added).

¶ 8 Defendant's motion to dismiss, as well as Plaintiffs' motion to transfer Defendant's motion to dismiss to the three-judge panel in Wake County came on for hearing and oral argument on 17 July 2020 in Forsyth County Superior Court before the Honorable Richard S. Gottlieb. Because Defendant's motion to dismiss was based solely upon Rule 12(b)(6), the trial court declined to rule on the Rule 12(b)(6) motion, and granted Plaintiffs' motion to transfer Defendant's motion to dismiss to Wake County pursuant to N.C. R. Civ. P. 42(b)(4). The trial court entered an order transferring "the action" to the three-judge panel of the Wake County Superior Court on 21 July 2020, and issued an amended order entered 22 July 2020, correcting a typographical error.

¶ 9 On 17 August 2020, Defendant filed a notice of appeal. On 16 December 2020, Plaintiffs filed a motion to dismiss Defendant's appeal, contending Defendant's appeal is interlocutory and does not affect a substantial right. On 4 January 2021, Plaintiffs' motion to dismiss Defendant's appeal was referred to this Panel. Also on 4 January 2021, Defendant petitioned this Court to issue a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure.

II . Jurisdiction

A. Interlocutory Nature of Defendant's Appeal

¶ 10 **[1]** Defendant argues the trial court's order granting Plaintiffs' motion to transfer Defendant's motion to dismiss ("trial court's order") changed the venue of the case. Defendant contends since the right to venue established by statute is a substantial right, Defendant's appeal of the trial court's order is jurisdictionally proper before this Court. Plaintiff contends Defendant's appeal is interlocutory and should be dismissed by this Court.

¶ 11 "An order is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' " *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E. 2d 82, 91 (1961)). "As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 188 (2011) (citations omitted). "Appeals from interlocutory orders are only available in exceptional circumstances." *Hamilton*, 212 N.C.

App. at 77, 711 S.E.2d at 188, (citation and internal quotations omitted). "The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978)).

¶ 12 N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(a)(3)a create an exception to the rule against interlocutory appeals for appeals challenging an interlocutory order affecting a "substantial right." A substantial right is one which will clearly be lost if the order is not reviewed before final judgment, such that the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). The North Carolina Supreme Court defines a substantial right as follows: "A legal right affecting or involving a matter of substance as distinguished from matter of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Am. Nat'l Stores Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (adopting the definition found in Webster's Third New Int'l Dictionary (1971).

¶ 13 Defendant is correct in its contention that the right to venue established by statute is a substantial right. *See Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("There can be no doubt that a right to venue established by statute is a substantial right . . . [and its] grant or denial is immediately appealable.") However, the order did not grant, deny, change, or otherwise affect venue, and therefore did not affect a substantial right. *See La Falce v. Wolcott*, 76 N.C. App. 565, 569, 334 S.E.2d 236, 239 (1985). The order entered addressed and sought to resolve an issue of subject matter jurisdiction, not an issue of venue.

¶ 14 Subject matter jurisdiction and venue are two distinct legal principles. Subject matter jurisdiction has been defined as "[a] court's power to decide a case or issue a decree." *In re M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012) (quoting Black's Law Dictionary 654, 927 (9th ed. 2009)). Venue, on the other hand, concerns "the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Stokes v. Stokes*, 371 N.C. 770, 772, 821 S.E.2d 161, 163 (2018) (cleaned up) (quoting Black's Law Dictionary (10th ed. 2014)).

¶ 15 Plaintiffs' motion to transfer Defendant's motion to dismiss was based on Plaintiffs' contention the three-judge panel in Wake County Superior Court had the statutory right, pursuant to N.C. R. Civ. P. 42(b)(4), to decide the constitutional issue raised by Defendant, not on a contention Wake County was a preferable location in comparison to Forsyth County. *See In re M.I.W.*, 365 N.C. at 377, 722 S.E.2d at 472; *see also Stokes*, 371 N.C. at 772, 821 S.E.2d at 163. The transcript reflects the word "venue" is used once by the trial court, specifically when acknowledging that only the constitutional issue would be transferred, and that venue for the action would remain in Forsyth County. Though the trial court's order stated the "action" was being transferred to the three-judge panel in Wake County Superior Court, the order reflects the venue would remain in Forsyth County. *See Holdstock v. Duke Univ. Health Sys.*, 270 N.C. App. 267, 279, 841 S.E.2d 307, 316 (2020) (citation omitted) (holding when a trial court transfers a facial challenge to a three-judge panel pursuant to N.C. R. Civ. P. 42(b)(4), it "maintain[s] jurisdiction over all matters other than the challenge to the act's facial validity").

¶ 16 Based on the language of the trial court as reflected in the transcript and on the face of its order, as well as the definitions of both "venue" and "subject matter jurisdiction," we conclude that the trial court order transferring Defendant's motion to dismiss to a three-judge panel in Wake County Superior Court was entered in compliance with the subject matter jurisdiction conveyed upon the three-judge panel by the General Assembly. It does not give rise to establishing or depriving Defendant of a substantial right. The trial court retained venue of the case in Forsyth County. Therefore, the trial court's order is not immediately reviewable, and Defendant's appeal is interlocutory.

B. Defendant's Petition for Writ of Certiorari

¶ 17 **[2]** Under N.C. R. App. P. 21(a)(1), "a writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where [*inter alia*] no right to appeal from an interlocutory order exists." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004). Consequently, "[i]t is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where . . . there is merit to an appellant's substantive arguments and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004). This Court has determined that such interests exist when the impact of the lawsuit is "significant," the issues involved are "important," and the case presents a need for the writ in the interest of the "efficient administration of justice," or the granting of the writ would "promote

judicial economy." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79 (granting review of a class action certification based on the "need for efficient administration of justice," the "significance of the issues in dispute," the "significant impact" of the lawsuit, the effect of the order on "numerous individuals and corporations" and the "substantial amount of potential liability" involved); *see also Hill v. Stubhub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (granting review in order to "further the interests of justice").

¶ 18 The issue Defendant raises on appeal presents the central question of what the appropriate requirements for a trial court are to transfer a case to be heard by a three-judge panel. Granting Defendant's petition would afford this Court the opportunity to consider a relatively new statutory scheme which has limited jurisprudence surrounding it. In considering the issues raised by Defendant this Court will have the opportunity to provide guidance and clarity to trial courts across North Carolina when evaluating the merits of a potential transfer of a case to a three-judge panel. For these reasons, we conclude that Defendant's raised issue is "significant" and "important" and that granting the petition for writ of certiorari will "promote judicial economy" by providing trial courts with guidance on a novel and complex statutory scheme. *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79; *see also Stubhub*, 219 N.C. App. at 232, 727 S.E.2d at 554.

C. Trial Court's Finding Plaintiff Raised a Facial Challenge

¶ 19 **[3]** In 2014 the North Carolina General Assembly implemented a statutory scheme which requires certain challenges to its acts be decided by a three-judge panel in the Superior Court of Wake County. *See* N.C. Gen. Stat. §§ 1-81.1 and 1-267.1. These statutes only apply to "facial challenges to the validity of an act of the General Assembly, not as applied challenges." *Holdstock v. Duke Univ. Health Sys.*, 270 N.C. App. at 271, 841 S.E.2d at 311 (2020) (cleaned up); N.C. Gen. Stat. § 1-267.1(a1). Under the North Carolina Rules of Civil Procedure, for a facial challenge to the validity of an act of the General Assembly to be transferred to a three-judge panel the facial challenge must be raised by a claimant in the claimant's complaint or amended complaint or by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 42(b)(4). If the facial challenge is properly raised, "the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel . . . ." *Id.*

¶ 20 In the case *sub judice*, the initial constitutional challenge was raised in Defendant's 1 June 2020 motion to dismiss. However, Defendant specifically stated that they were arguing the General Assembly's 2019 amendments "are unconstitutional only as applied to the Kernersville YMCA on the particular facts of this case . . . ." No mention of a facial challenge was made until Plaintiffs' motion to transfer Defendant's motion to dismiss to a three-judge panel. In their motion to transfer, the Plaintiffs' asserted that Defendant was in fact making a facial challenge to the 2019 amendments. Following Plaintiffs' motion to transfer, Defendant reaffirmed they were making an as applied challenge to the constitutionality of the 2019 amendments by filing an amended motion to dismiss (which maintained the as applied language) and arguing before the trial court at the hearing on the motion to transfer that their challenge was an as applied challenge.

¶ 21 In its order transferring Defendant's motion to dismiss to a three-judge panel, the trial court stated, "[u]nder the provisions of N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), because Plaintiff has asserted facial challenges to the constitutionality of acts of the North Carolina General Assembly, the challenges must be heard and determined by a three-judge panel of the Wake County Superior Court." However, we conclude that Plaintiffs did not make a facial challenge to the constitutionality of the 2019 amendments. In fact, Plaintiffs specifically stated they were not arguing the 2019 amendments were unconstitutional, only that Defendant's challenge was in fact a facial challenge. Further, even if Plaintiffs had made a facial challenge, they did so in a motion to transfer, not in their complaint as required by Rule 42(b)(4). In fact, making any argument the 2019 amendments were unconstitutional would be in direct opposition to Plaintiffs' claims before the trial court. As Defendant made clear they were only making an as applied challenge to the 2019 amendments, and the trial court did not make a determination itself that Defendant's constitutional challenges were in fact a facial challenge, no facial challenge was made in the time prescribed by Rule 42(b)(4) for a court to be able to transfer a facial challenge to a three-judge panel.

¶ 22 Defendant YMCA moved to dismiss all claims, clearly making an "as applied" challenge to Section 1-17(e).[1] Defendant does not challenge the authority of the General Assembly to create disabilities as a

1. I note that Section 1-17(d) provides that a minor who suffers sexual abuse may sue a defendant for claims related to the sexual abuse has until (s)he turns 28 years of age to bring such action. Subsection (d) does not come into play in this present case as all Plaintiffs were over 28 years of age when the present action was commenced.

means of extending the time during which a sufferer of sexual abuse may sue. Rather, Defendant only challenges subsection (e)'s application to claims *that had already become time-barred* prior to its enactment in 2019. Indeed, our Supreme Court has held that "[a] right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly. . . . But the Legislature may [only] extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute." *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949). *See also Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965).

¶ 23 While the trial court is free to transfer an action to a three-judge panel on its own motion based on a facial challenge to an act of the General Assembly, a trial court is not free to impute a facial challenge argument on a party. Nor is a trial court free to transfer a matter to a three-judge panel so that the three-judge panel may decide whether a facial challenge was raised. The plain language of the statutory scheme clearly provides that a party must affirmatively raise a facial challenge, and that facial challenge must be raised in either the claimant's complaint/amended complaint or the defendant's answer, responsive pleading, or within 30 days of the defendant's answer or responsive pleading. N.C. Gen. Stat. §§ 1-81.1, 1-267.1, and 1A-1, Rule 42(b)(4). No such facial challenge was raised here. As a result, we conclude the trial court erred by transferring Defendant's motion to dismiss to a three-judge panel.

VI. Conclusion

¶ 24 We hold the trial court's order transferring Defendant's motion to dismiss to a three-judge panel in Wake County Superior Court was an interlocutory order not affecting a substantial right. We also conclude that this case presents significant and important issues and grant Defendant's petition for writ of certiorari in the interest of judicial economy. As a result, we necessarily deny Plaintiffs' motion to dismiss Defendant's appeal.

¶ 25 We hold neither party raised a facial challenge to the 2019 amendments and that the trial court erred by transferring Defendant's motion to dismiss to a three-judge panel. Thus, we vacate and remand this matter to the trial court for further proceedings not inconsistent with this order.

VACATE AND REMAND.

Judge DILLON concurs.

Judge CARPENTER dissents.

CARPENTER, Judge, dissenting.

¶ 26 Under N.C. R. App. P. 21(a)(1), "a writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where [*inter alia*] no right to appeal from an interlocutory order exists." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004). Consequently, "[i]t is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where . . . there is merit to an appellant's substantive arguments and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004). This Court has determined that such interests exist when the impact of the lawsuit is "significant," the issues involved are "important," and the case presents a need for the writ in the interests of the "efficient administration of justice," or the granting of the writ would "promote judicial economy." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79 (granting review of a class action certification based on the "need for efficient administration of justice," the "significance of the issues in dispute," the "significant impact" of the lawsuit, the effect of the order on "numerous individuals and corporations" and the "substantial amount of potential liability" involved); *see also Hill v. Stubhub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (granting review in order to "further the interests of justice").

¶ 27 The issues Defendant raises on appeal present the central question of whether the constitutional challenge to N.C. Gen. Stat. § 1-17(e) should be heard by a three-judge panel or an individual judge in Forsyth County. Defendant is not asking this Court to decide the constitutionality of the statute—nor is this Court the proper place to do so. Consequently, while Defendant's raised issue is "significant" and "important" to the parties, it does not introduce a matter so pressing that the denial of Defendant's petition would negatively affect the "efficient administration of justice" or work against our judicial economy. *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79; *see also Stubhub*, 219 N.C. App. at 232, 727 S.E.2d at 554.

¶ 28 Rather, Defendant's sub-issue—whether Defendant's constitutional challenge is an as-applied or facial constitutional challenge—is a determination best made by the trial court and filtered through the statutory scheme prescribed by the legislature. *See* N.C. Gen. Stat. § 1-267.1 (2019). The trial court had the benefit of hearing arguments

of counsel and receiving memoranda on the issues. Further, when the constitutional challenge is ultimately decided by the three-judge panel in Wake County Superior Court, the matter may be remanded back to the trial court upon any initial determination by the three-judge panel that it lacks jurisdiction to rule on the challenge because it is not a facial challenge. The legislature has contemplated and incorporated a *de facto* review of the initial determination of the trial judge by the appointed three-judge panel. This Court's grant of a petition for writ of certiorari to consider whether jurisdiction is proper with a three-judge panel in Wake County Superior Court based solely on Defendant's assertion its constitutional challenge is "as-applied" shortcuts the statutory scheme prescribed by the legislature, would be an inappropriate circumvention of the process, and therefore would not "promote judicial economy," but would interfere with the "efficient administration of justice." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79; *see also Stubhub*, 219 N.C. App. at 232, 727 S.E.2d at 554.

¶ 29 The legislature set forth a statutory scheme to address constitutional challenges to statutes. *See* N.C. Gen. Stat. § 1-267.1. In brief, a trial court determines, either by statutory mandate or in its discretion, to transfer subject matter jurisdiction of a constitutional challenge to a three-judge panel in Wake County; upon transfer, the issue is within the jurisdiction of the three-judge panel. In granting Defendant's petition for writ of certiorari, this Court will create precedent for a new procedure whereby a party that disagrees with a trial judge's referral of a constitutional challenge to a three-judge panel can petition this Court for a writ of certiorari. In such an instance, this Court will be tasked with explaining why the raised constitutional challenge in the case currently before it is distinguishable from any future constitutional challenge. The precedent that flows from the majority's opinion will create a dilemma in which any disagreement between the parties as to whether a constitutional challenge is "facial" or "as applied" will be decided by this Court, rather than by the three-judge panel prescribed by statute. The precedent established here therefore has the potential to eliminate the role of the statutory three-judge panel in future constitutional challenges.

¶ 30 This Court, by granting Defendant's petition for writ of certiorari, will also unwittingly decide that multiple classes in fact exist for purposes of the constitutionality of N.C. Gen. Stat. § 1-17(e). To do so is to take a critical step in determining the ultimate outcome of the central issue of the case before the trial court. It would be prudent for this Court to refrain from exercising its jurisdiction to grant Defendant's petition for writ of certiorari in favor of and in deference to the statutory scheme prescribed by the legislature in N.C. Gen. Stat. § 1-267.1.

¶ 31 Lastly, granting Defendant's petition for writ of certiorari creates an avenue for a party to draw out litigation, contrary to our goal of promoting judicial economy. The majority's grant incentivizes parties who wish to delay a trial on the merits of a case to petition this Court for a decision as to whether the referral of an issue to the three-judge panel was proper in every instance. The risk of the emergence of such unnecessary appeals is exaggerated by the majority's declination to identify reasons for this case's unique importance or necessity to the protection of the interests of justice. In the future, this Court should expect petitions for writ of certiorari arising from similar referrals to three-judge panels. When the petitions arrive, this Court will have no precedence on which we may rely to deny granting certiorari to hear a challenge to a superior court judge's order transferring a constitutional challenge of a statute to a three-judge panel.

¶ 32 Because I would determine jurisdiction to decide the constitutional issue is proper before the three-judge panel in Wake County, I would deny Defendant's petition for writ of certiorari. I therefore respectfully dissent.

IN THE MATTER OF J.G.

No. COA21-353

Filed 16 November 2021

Juveniles—transcript of admission—most severe disposition—exceeded by court

Where a juvenile's transcript of admission provided—and the juvenile court informed him—that the most severe disposition on his charge for breaking or entering a motor vehicle would be a Level 2 disposition, the juvenile court erred by adjudicating him to be a Level 3 delinquent juvenile. The adjudication and disposition orders were set aside, placing the parties in the positions they occupied at the beginning of the proceedings.

Appeal by respondent-juvenile by writ of certiorari from adjudication order entered 5 October 2020 by Judge Sam Hamadani in Wake County District Court and amended dispositional order entered 7 April 2021 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 19 October 2021.

IN RE J.G.

[280 N.C. App. 321, 2021-NCCOA-613]

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for respondent-appellant juvenile.

ZACHARY, Judge.

¶ 1 Respondent-juvenile "Jake" appeals from the trial court's orders adjudicating him to be a Level 3 delinquent juvenile and committing him to a Youth Development Center. After careful review, we reverse the adjudication and disposition orders and remand for further proceedings.

Background

¶ 2 The relevant facts are few. On 5 October 2020, Jake appeared in Wake County District Court on four juvenile petitions, one alleging that he had committed the offense of breaking or entering a motor vehicle. Jake, his counsel, and the prosecutor entered into a transcript of admission, in which Jake admitted to one count of breaking or entering a motor vehicle. The juvenile court accepted and signed the transcript of admission. The transcript of admission provided that the "most serious/severe disposition" on the charge was a Level 2 disposition. The juvenile court also informed Jake that the most serious disposition that he could face for the breaking or entering charge was a Level 2 disposition, "which could include, among other things, detention for up to 14 24-hour periods, placement in a wilderness program or a residential treatment facility, or house arrest[.]" The State dismissed the three remaining charges, and the court adjudicated Jake to be delinquent and transferred his case to Cumberland County District Court for disposition.

¶ 3 The disposition hearing was held on 24 February 2021 in Cumberland County District Court. After evaluating Jake's prior history with the juvenile court system, the court concluded that it "ha[d] no other alternative but to recommend and [o]rder a Level [3] Disposition." On 25 February 2021, the court entered its order directing that Jake be committed to a Youth Development Center for a minimum of 6 months, with the term of commitment not to exceed his 20th birthday. On 12 March, 22 March, and 7 April 2021, the juvenile court entered amended orders that continued the Level 3 disposition. On 25 February 2021, Jake gave written notice of appeal.

Grounds for Appellate Review

¶ 4 As a preliminary matter, we address our jurisdiction to consider the merits of Jake's appeal. Although Jake filed a written notice of appeal, his notice was not sufficient to confer jurisdiction on this Court.

¶ 5 First, the notice did not comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. Although the notice included the correct name and juvenile court file number for Jake's case, it did not otherwise properly identify the orders being appealed, specify the court to which the appeal was directed, or include the requisite proof of service of the notice on the State. *See* N.C. R. App. P. 3; N.C. Gen. Stat. § 7B-2602 (2019). Moreover, the juvenile court entered three amended dispositional orders after Jake's notice of appeal was filed on 25 February.

¶ 6 Generally, when a juvenile "has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *In re E.A.*, 267 N.C. App. 396, 397, 833 S.E.2d 630, 631 (2019) (citation omitted). Accordingly, Jake's appeal is subject to dismissal. *In re I.T.P–L.*, 194 N.C. App. 453, 459, 670 S.E.2d 282, 285 (2008), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009).

¶ 7 However, during the pendency of this appeal, Jake's appellate counsel filed a petition for writ of certiorari with this Court. For the reasons explained below, we allow Jake's petition for writ of certiorari.

¶ 8 Pursuant to Rule 21, this Court may allow a petition for writ of certiorari in juvenile cases "to permit consideration of their appeals on the merits so as to avoid penalizing [r]espondents for their attorneys' errors." *Id.* at 460, 670 S.E.2d at 285 (allowing petitions for writ of certiorari where respondent-parents filed "timely, albeit incomplete, notices of appeal").

¶ 9 Here, although not properly perfected, Jake's notice of appeal clearly demonstrated his intent to appeal the adjudication and disposition orders: it was filed the day after the dispositional hearing, it referenced the correct juvenile court file number, and it was titled "Notice of Appeal." Additionally, for reasons more fully explained below, there is no resulting prejudice to the State, which concedes the trial court's error. Thus, pursuant to Rule 21, we allow Jake's petition for writ of certiorari and proceed to the merits of his appeal. N.C. R. App. P. 21(a)(1).

Discussion

¶ 10 Jake asserts that the juvenile court erred in ordering a Level 3 disposition, when the transcript of admission provided, and the juvenile court

informed him, that the most severe disposition that he would receive was a Level 2. Such error, Jake argues, rendered his admission to the relevant offense neither knowing nor voluntary, and consequently requires reversal of the adjudication and disposition orders. The State concedes the juvenile court's error, and after careful review, we agree.

¶ 11 "We have long considered that the acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case." *In re W.H.*, 166 N.C. App. 643, 645, 603 S.E.2d 356, 358 (2004). The record in a juvenile case "must therefore affirmatively show on its face that the admission was entered knowingly and voluntarily." *Id.* at 646, 603 S.E.2d at 358 (citation omitted).

¶ 12 Section 7B-2407 of the Juvenile Code requires that the trial court inform the juvenile, inter alia, "of the most restrictive disposition on the charge" before accepting the juvenile's admission. N.C. Gen. Stat. § 7B-2407(a)(6). "If the face of the record does not affirmatively show the trial court's compliance with N.C. Gen. Stat. § 7B-2407 and the knowing and voluntary nature of the juvenile's admission, the adjudication of delinquency will be set aside." *In re W.H.*, 166 N.C. App. at 646, 603 S.E.2d at 359. "[W]hen a trial court plans to impose a disposition level higher than that set out in the [transcript of admission], the juvenile must be given a chance to withdraw his plea and be granted a continuance." *Id.* at 647, 603 S.E.2d at 359.

¶ 13 In the present case, Jake's "admission was based on a belief that the most restrictive disposition he could receive was a Level 2, and the [juvenile] court, without sufficient notice to him or any accompanying chance to withdraw the admission, raised the most restrictive disposition he could receive to a Level 3." *Id.* Thus, as the State concedes, Jake's admission was not knowing and voluntary, and the adjudication of delinquency, as well as the disposition order, must "be set aside." *Id.* at 646, 603 S.E.2d at 359. The reversal of the orders "places the parties as they were at the beginning of the proceedings." *In re D.A.F.*, 179 N.C. App. 832, 837, 635 S.E.2d 509, 512 (2006).

Conclusion

¶ 14 Accordingly, we vacate the transcript of admission, reverse the juvenile court's adjudication order and amended disposition order, and remand for further proceedings consistent with this opinion.

VACATED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and COLLINS concur.

JACKSON v. JACKSON

[280 N.C. App. 325, 2021-NCCOA-614]

LISA JACKSON, PLAINTIFF
v.
SAMUEL L. JACKSON, DEFENDANT

No. COA20-699

Filed 16 November 2021

1. Child Custody and Support—termination of support—terms of parties' separation agreement—presumption of reasonableness

In a child support action, where the parties previously agreed on a child support amount in a private, unincorporated separation agreement, the trial court properly applied a presumption of reasonableness in awarding the mother the agreed-upon amount and damages for breach of contract based upon the father's nonpayment. Although the father argued that his support obligation terminated when he became the custodial parent for a period of time, that scenario was not one of the enumerated reasons listed in the agreement for terminating support. Therefore, since the agreement remained in force, its terms controlled.

2. Child Custody and Support—amount of support—reasonable needs of child—at time of hearing—sufficiency of findings

In a child support action where the parties had previously agreed to a child support amount in a private, unincorporated separation agreement, the trial court's determination of the father's child support obligation was not based on competent evidence where its findings regarding the reasonable needs of the child did not address present expenses at the time of the hearing. Further, findings on past expenditures were speculative where they detailed the amount of money spent by the mother, but not how much of that money was spent to cover the child's expenses.

3. Attorney Fees—child support action—terms of parties' separation agreement—controlling

In a child support action, where the parties' private, unincorporated separation agreement (which resolved issues of child custody, child support, and attorney fees between the parties) specifically stated that the prevailing party in any civil action brought to enforce the agreement would be entitled to attorney fees, the trial court properly awarded fees to the mother who prevailed in her claim for breach of contract, and not to the father for his attempt to modify the agreement.

4. Child Custody and Support—child support—calculation—imputed income—sufficiency of evidence

In a child support action, a finding by the trial court regarding the father's income was not made in error where there was competent evidence of his base salary and earned commissions, the last of which he was due to receive the week of the hearing. Further, the trial court's finding regarding the mother's income took into account support she received from third parties.

Appeal by defendant from order and judgment entered 10 December 2019 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 24 August 2021.

Fox Rothschild LLP, by Michelle D. Connell and Kip D. Nelson, for plaintiff-appellee.

Sandlin Family Law Group, by Deborah Sandlin, for defendant-appellant.

GORE, Judge.

¶ 1 Samuel L. Jackson ("defendant") appeals from an order in which the trial court established child support at the contractual amount set forth in the parties' separation agreement, and ordered defendant pay $21,505 in damages and $5,000 in attorney fees. Defendant argues that (1) the trial court erred in awarding child support to Lisa Jackson ("plaintiff"); (2) the trial court erred in awarding damages to plaintiff because the parties' contractual obligations had terminated; (3) the trial court erred in awarding attorney fees to plaintiff and not to defendant; and (4) the trial court erred by imputing income to defendant. We affirm in part, vacate in part, and remand.

I. Background

¶ 2 Plaintiff and defendant married in 1992, and three children were born to the marriage.[1] On 17 May 2013, plaintiff and defendant separated and were subsequently divorced. In October 2013, the parties executed a separation agreement and property settlement ("separation agreement"), which resolved, *inter alia*, issues of child custody, child support, and attorneys' fees. The parties agreed to share equal physical

1. At the time of separation all three marital children were minors. However, at the time this action was commenced only one marital child remained a minor.

and legal custody of the minor children. In the separation agreement, the parties agreed that defendant would pay plaintiff $1,150 per month in child support. The parties agreed that the child support payments shall terminate on the first occurrence of:

> (1) The parties' youngest living child reaches the age of 18 or graduates from high school or its equivalent, whichever occurs last, so long as satisfactory progress towards graduation is being made, but no later than age 20;
>
> (2) Emancipation of the children;
>
> (3) Death of the children;
>
> (4) Death of [defendant]; or
>
> (5) A court of competent jurisdiction enters a court order modifying or terminating child support.

The parties further agreed that if either party shall be required to bring a civil action to obtain performance of the separation agreement, the prevailing party shall be entitled to indemnification by the other party for reasonable attorneys' fees. The separation agreement was never incorporated into a court order.

¶ 3 In the summer of 2016, plaintiff moved from Raleigh, North Carolina to Wilmington, North Carolina to live with her fiancé. At this time, the parties' oldest child had reached the age of majority. The parties' second child moved to Wilmington with plaintiff while their youngest child remained in Raleigh with defendant.

¶ 4 On 15 June 2017, defendant filed a motion in the cause for child support alleging plaintiff owed a duty of child support to defendant, because at the time the parties' only remaining minor child was living solely with defendant. Defendant requested the trial court award temporary and permanent child support pursuant to the North Carolina Child Support Guidelines, terminate the child support obligations contained in the separation agreement, and award defendant reasonable attorneys' fees. On 19 January 2018, plaintiff filed a complaint alleging defendant breached the parties' contract by unilaterally lowering, and subsequently ceasing, child support payments. Plaintiff sought specific performance of child support arrearages and reasonable attorneys' fees. Plaintiff also requested the trial court consolidate defendant's and plaintiff's actions.

¶ 5 In August of 2018, the parties' youngest daughter moved to Wilmington to live with plaintiff. On 12 September 2018, defendant voluntarily dismissed his motion for temporary child support, but not his

action for permanent child support. On 2 January 2019, defendant filed his answer to plaintiff's complaint asserting the affirmative defense that the child support obligation under the separation agreement should terminate upon the trial court entering an order in defendant's action.

¶ 6 A hearing was held on 22 April 2019. On 17 September 2019, the Honorable Judge Walczyk sent an email to the parties with a written rendering of her ruling but had yet to enter an order in the matter. On 30 October 2019, following the hearing but before the trial court entered its order, plaintiff filed a motion requesting the trial court enter a temporary restraining order and preliminary injunction against defendant to hold in trust the funds from property sales by defendant, because defendant had previously informed plaintiff of his intent to appeal the trial court's order in her favor. Defendant objected to plaintiff's motion. The trial court denied plaintiff's motion as insufficient to warrant the entry of a temporary restraining order and preliminary injunction.

¶ 7 On 10 December 2019, the trial court entered an order establishing child support in favor of plaintiff in the amount of $1,150 per month, the contractual amount. The trial court concluded plaintiff was not entitled to specific performance but awarded plaintiff $21,505 in damages for defendant's breach of contract and awarded plaintiff $5,000 in attorneys' fees. On 13 January 2020, defendant gave timely notice of appeal from the trial court's 10 December 2019 order.

II. Standard of Review

¶ 8 "Our review of a child support order is limited to determining whether the trial court abused its discretion." *Brind'Amour v. Brind'Amour*, 196 N.C. App. 322, 327, 674 S.E.2d 448, 452 (2009). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Roberts v. McAllister*, 174 N.C. App. 369, 374, 621 S.E.2d 191, 195 (2005) (citation omitted). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.* (citation omitted).

III. Child Support

¶ 9 "A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened."

McKaughn v. McKaughn, 29 N.C. App. 702, 705, 225 S.E.2d 616, 618 (1976) (citation omitted). "[W]here parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963). A party seeking an initial judicial determination of child support, where the parties have previously executed an unincorporated separation agreement, must "show the amount of support necessary to meet the reasonable needs of the children at the time of the hearing." *Boyd v. Boyd*, 81 N.C. App. 71, 76, 343 S.E.2d 581, 585 (1986). The trial court will not alter the amount of child support contractually agreed upon by the parties, unless the amount necessary to meet the reasonable needs of the child substantially differs from the agreed upon amount. *Id.*

¶ 10 This Court in *Pataky v. Pataky* laid out the step-by-step process a trial court must take when analyzing a claim for child support, where the parties previously entered into an unincorporated separation agreement:

> [T]he court should first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be "inappropriate." The court should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate. If, however, the court determines by the greater weight of the evidence, that the presumption of reasonableness afforded the separation agreement allowance has been rebutted, taking into account the needs of the child existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50-13.4(c), the court then looks to the presumptive guidelines established through operation of G.S. § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the guidelines "would not meet or would exceed the needs of the child . . . or would be otherwise unjust or inappropriate."

Pataky v. Pataky, 160 N.C. App. 289, 305, 585 S.E.2d 404, 414-15 (2003), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004).

¶ 11 **[1]** Defendant first contends that the trial court erred by applying the *Pataky* presumption because his child support obligation under the unincorporated separation agreement terminated when he became the custodial parent for the parties' only minor child. Defendant similarly argues that because the child support provisions terminated, the trial court erred by awarding plaintiff damages.

¶ 12 Defendant argues *Rustad v. Rustad*, 68 N.C. App. 58, 314 S.E.2d 275, *disc. rev. denied*, 311 N.C. 763, 321 S.E.2d 145 (1984), stands for the proposition that a change in custody of a minor child, in violation of the child custody provisions of the separation agreement, automatically terminates child support obligations under a separation agreement. However, defendant has an overly broad view of *Rustad*. The separation agreement in *Rustad* contemplated what would happen if custody of the minor children changed. In contrast, the separation agreement in the present matter did not contemplate the effect a possible violation or an agreed upon change in custody would have on child support. While the separation agreement did enumerate five specific events that would terminate child support, a change in custody of the minor children was not included on this list. The facts of the present case are not analogous to the facts of *Rustad*, and therefore, *Rustad* does not control.

¶ 13 The separation agreement at issue here provides specific events that would terminate child support. Those events are:

> (1) The parties' youngest living child reaches the age of 18 or graduates from high school or its equivalent, whichever occurs last, so long as satisfactory progress towards graduation is being made, but no later than age 20;
>
> (2) Emancipation of the children;
>
> (3) Death of the children;
>
> (4) Death of [defendant]; or
>
> (5) A court of competent jurisdiction enters a court order modifying or terminating child support.

At the time defendant filed his action, the parties' youngest child had yet to reach the age of majority and was still enrolled in high school. The order entered by the trial court established child support at the contractual amount under the separation agreement, which does not constitute a modification or termination of child support. Contract principles govern

an unincorporated separation agreement. *See McKaughn*, 29 N.C. App. at 705, 225 S.E.2d at 618. Thus, the only events that could terminate the child support obligation in the present case are those enumerated in the separation agreement, and the parties are subject to damages for breach of contract if they violate the terms of the separation agreement.

¶ 14 Further, the separation agreement included a clause stating, "It is the intention and agreement of the parties that each provision of this Agreement is separate and independent from each other provision contained herein." Thus, any breach by plaintiff of the child custody provisions of the separation agreement, by moving to Wilmington with the parties' middle minor child and leaving their youngest child in the sole care of defendant, would have no effect on the status of the separation agreement's child support provisions. As a result, we conclude the separation agreement remained in force and the trial court did not err by finding as such and applying the *Pataky* presumption of reasonableness to the separation agreement nor by awarding damages for breach of the contract.

¶ 15 **[2]** Defendant next argues that if we find the *Pataky* presumption applied to the separation agreement, the presumption was rebutted. If the amount necessary to meet the needs of the child, at the time of the hearing, "substantially exceeds" the amount of child support provided for in the separation agreement, then the presumption that the amount provided in the separation agreement is reasonable is rebutted. *Pataky*, 160 N.C. App. at 301, 585 S.E.2d at 412; *Boyd*, 81 N.C. App. at 76, 343 S.E.2d at 585 (1986).

¶ 16 "In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of *specific* fact on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E.2d 47, 50 (1985) (emphasis added). "[F]actual findings must be supported by evidence, and not based on speculation." *Id.* at 236-37, 328 S.E.2d at 51. The trial court may not estimate what portion of household expenses are attributable to the minor child, without evidence supporting the attribution. *See id.* at 236, 328 S.E.2d at 51. The trial court must consider competent evidence of the minor child's yearly expenses incurred by both parents, even if the child lived with each parent at different times throughout the year, to determine the minor child's reasonable needs fully and accurately. *Id.*

¶ 17 The trial court's findings of fact as to the reasonable needs of the child are as follows:

33. The Defendant is currently paying health insurance premiums for himself and the children. He pays a total of $251.11 per month in health, dental and vision premiums. A portion of this amount is for the Defendant. The Court finds that the Defendant is paying $83.70 in premiums for Ella each month.

. . .

44. The Plaintiff is engaged to Scott Diggs. The Plaintiff shares expenses with her fiancé. She pays for groceries and the children's expenses, but her fiancé pays the mortgage and expenses associated with the residence.

. . .

58. The Plaintiff went through all of her bank statements and credit card statements for 2017, 2018, and 2019 and cross-referenced those expenses with the times that she had Ella in her care.

59. The Plaintiff testified that she incurred expenses on behalf of both children (Grace and Ella) in the amount of $35,726.77 in 2017. This includes expenses for Plaintiff's home and utilities, the adult child Grace, and the Plaintiff's legal costs relating to child support. After excluding expenses relating to Grace and legal costs, the Court finds that the actual amount of reasonable expenses incurred by Plaintiff for Ella, in 2017, was $13,080.00 or $1,090.00 per month.

60. The Plaintiff testified that she incurred expenses on behalf of both children in the amount of $36,339.31 in 2018. This includes expenses for Plaintiff's home and utilities, the adult child Grace, and the Plaintiff's legal costs relating to child support. The Court finds that the Plaintiff actually incurred reasonable expenses for Ella, in 2018, in the amount of $9,495.00 or $791.00 per month.

61. Although Plaintiff failed to provide expenses paid after January 2019, the Plaintiff incurred costs relating to the child including for groceries and eating out, personal care, and driver's education ($385.00). The

> Plaintiff uses her car, with a $677.00 per month lease payment, to transport Ella to events and school.
>
> . . .
>
> 64. The Defendant incurred tuition payments on behalf of Ella in 2017 in the amount of $7,325.00. The parties are no longer paying for Ravenscroft in Wake County.
>
> 65. In 2017, Ella was living primarily with Defendant and he was also incurring food expenses, health care premium expenses, and unreimbursed medical expenses. . . .
>
> 66. According to the Defendant's Financial Affidavit, he is currently incurring costs on behalf of the "children" including health care premiums, uninsured medical expenses, entertainment, allowances, eating out, etc. The Defendant listed $2,553.98 in expenses per month for the children's individual monthly expenses.
>
> 67. The Court recognizes that Ella has not stayed with the Defendant more than twice since January 2019 and many of the expenses are not actually being incurred by Plaintiff in 2019. It is important to note, however, that even if only half of these individual expenses are for Ella, that the Defendant is acknowledging that her care requires at least $1,276.99 per month. This does not include regular [re]curring expenses such as housing, utilities, and transportation, etc.

The evidence presented at the 22 April 2019 hearing as to the reasonable needs of the minor child included bank and credit card statements by plaintiff, as well as a financial affidavit, a record of payments for the children's expenses, health insurance costs, bank statements, and credit card statements by defendant. Both parties testified as to the minor child's expenses at the hearing. Further, plaintiff provided the trial court with notes regarding children's expenses, but because these notes were partly based on evidence not presented at the hearing, the exhibit was admitted for illustrative purposes only and not as substantive evidence.

¶ 18 We conclude that the trial court's findings of fact as to the minor child's reasonable needs at best made findings as to the minor child's past expenditures but did not make a finding of her reasonable present expenses. Finding of fact 61 states,

> Although Plaintiff failed to provide expenses paid after January 2019, the Plaintiff incurred costs relating to the child including for groceries and eating out, personal care, and driver's education ($385.00). The Plaintiff uses her car, with a $677.00 per month lease payment, to transport [the minor child] to events and school.

This finding of fact establishes that any findings as to the minor child's reasonable expenses at the time of the hearing in April 2019 was not supported by evidence. The trial court previously indicated in its findings of fact that the minor child lived with plaintiff full-time beginning in 2018. Further, finding of fact 61 establishes that plaintiff failed to provide any evidence of expenses incurred after January 2019, thus plaintiff provided no evidence as to the minor child's current reasonable expenses *at the time of the hearing*.

¶ 19 The trial court's findings as to the minor child's past expenses, as incurred by the plaintiff, are also insufficient. For both 2017 and 2018 the trial court made findings as to plaintiff's total expenses for each year and then found the minor child's expenses for each year "[a]fter excluding expenses relating to [the parties' adult child] and legal costs. . . ." However, these findings do not show this Court that the trial court made findings to the minor child's expenses in 2017 and 2018 based on competent evidence and not speculation. The substantive evidence of expenses offered by plaintiff included bank and credit card statements. While these exhibits show how much money was spent by plaintiff, they do not provide information on what proportion of that money was spent to cover the minor child's expenses. The only evidence offered by plaintiff that delineated what costs were incurred specifically for the minor child was Exhibit 13, "notes regarding the children's expenses." However, Exhibit 13 was only admitted for illustrative purposes, thus the trial court could not have relied on this exhibit to determine how much of plaintiff's total expenses for 2017 and 2018 were for the minor child's needs. Because a trial court may not speculate as to what the minor child's expenses were and may not estimate what portion of household expenses are attributable to the minor child, without evidence supporting the attribution, the trial court's findings of the minor child's expenses paid by plaintiff in 2017 and 2018 are insufficient without further evidence. *See Atwell*, 74 N.C. App. at 236-37, 328 S.E.2d at 51.

¶ 20 The trial court's factual findings regarding defendant's expenses for the minor child are also insufficient to establish the minor child's reasonable expenses at the time of the trial. The trial court found that despite

the fact the minor child "has not stayed with Defendant more than twice since January 2019" defendant's financial affidavit "acknowledg[es] that her care requires at least $1,276.99 per month." This finding suffers the inherent flaw that if in 2019 the minor child is not living with defendant for more than brief visits, as the record shows, defendant's financials cannot serve as "competent evidence" to support a finding of the minor child's present expenses *at the time of the hearing*.

¶ 21 The trial court's findings of fact as to the minor child's reasonable needs at the time of the hearing were not supported by competent evidence and, therefore, were insufficient. Thus, the trial court's conclusion that the contractual child support amount was sufficient to meet the minor child's needs and that the *Pataky* presumption had been rebutted were insufficient as a matter of law. *See Thomas v. Thomas*, 233 N.C. App. 736, 738, 757 S.E.2d 375, 378 (2014) ("The trial court's conclusions of law must be supported by adequate findings of fact."). We remand this issue to the trial court for further findings of fact as to the reasonable needs of the minor child and reconsideration of the *Pataky* presumption.

IV. Attorney's Fees

¶ 22 **[3]** Defendant argues the trial court erred in awarding attorney's fees to plaintiff because it could not be found that defendant breached the contract after the child support provision terminated, therefore, plaintiff was not entitled to attorney's fees under the separation agreement. Further, defendant argues that the trial court erred in denying his claim for attorney's fees, because he was statutorily entitled to child support and therefore, also entitled to attorney's fees under the separation agreement. Notably, defendant is not arguing that the amount of attorney's fees awarded was not reasonable, as a result, we only analyze and discuss the award of attorney's fees and not the reasonableness of the amount awarded.

¶ 23 As discussed above, the child support provision in the parties' separation agreement did not terminate and remained in force. Thus, the issue of who is entitled to attorney's fees under the separation agreement is a matter of contract interpretation. "[Q]uestions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

¶ 24 The attorney's fees provision in the separation agreement provides,

> In the event that [either party] shall be required to bring a civil action against the other to obtain any performance by the other of this Agreement, then the

> party bringing such lawsuit shall be indemnified and shall be entitled to receive from the other such reasonable attorney's fees in respect to the action filed as shall be fixed by the Court in the event that the party shall prevail and the action terminated in the moving party's favor. The party who prevails shall be indemnified by the other for attorney's fees and court costs he or she incurred in bringing or defending of a lawsuit as set forth herein. If such civil action is determined adversely to the moving party, the defending party shall be entitled to receive from the moving party such reasonable attorney's fees in respect to defending such action as shall be fixed by the Court.

Under the separation agreement, the prevailing party in a civil action is entitled to attorney's fees. In the instant matter, plaintiff was the prevailing party at the trial court, and as discussed above the trial court properly awarded her damages for breach of contract. Thus, the trial court did not err by awarding plaintiff reasonable attorney's fees in accordance with the separation agreement.

¶ 25 Defendant also contends that he was entitled to attorney's fees, pursuant to N.C. Gen. Stat. § 50-13.6 and the parties' agreement. Under the separation agreement, defendant would only be entitled to attorney's fees if he were the prevailing party in a civil action "to obtain any performance by [plaintiff] of this Agreement . . . ." Here, defendant was not the prevailing party in plaintiff's action, because plaintiff was entitled to damages for defendant's breach of the separation agreement, and defendant's action was brought to obtain a modification in the separation agreement, not to enforce any provisions of the separation agreement. Thus, defendant is not entitled to attorney's fees under the separation agreement.

¶ 26 Under the statute, in child custody or support proceedings, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2019). "The court's discretion in disallowing attorneys' fees is limited only by the abuse of discretion rule." *Puett v. Puett*, 75 N.C. App. 554, 558-59, 331 S.E.2d 287, 291 (1985) (citation omitted). We find no abuse of discretion in the present case.

¶ 27 Thus, the trial court did not err in finding defendant was not entitled to attorney's fees.

V. Determination of Income

¶ 28 **[4]** Defendant's final argument is that the trial court erred in making finding of fact 30, because the trial court imputed income to defendant, and finding of fact 48, because it is not based on competent evidence.

¶ 29 "Normally, a party's ability to pay child support is determined by that party's income at the time the award is made." *Pataky*, 160 N.C. App. at 306, 585 S.E.2d at 415 (cleaned up). A finding of a party's income may be based only on their actual income at the time of the hearing; projected earnings may not be considered. *Atwell*, 74 N.C. App. at 235, 328 S.E.2d at 50. Here, finding of fact 30 states,

> Defendant currently works at Charter Communications (Spectrum). His base salary is $58,000 per year. Although, the Defendant hopes to earn more in the future, with commissions and bonuses, the Court finds Defendant is currently earning $71,000 annually or $5,916.00 per month.

Evidence offered by defendant indicate that his base salary is $58,000 per year and that he expects to earn commissions but has yet to earn any commissions. Additionally, defendant testified he would receive income between $12,000 and $15,000 over three payments during a one-time "ramp-up period." At the time of the hearing, defendant had received two of the three payments from the "ramp-up period" and the third payment was scheduled to be deposited later that week. Thus, we conclude the trial court's finding of defendant's income was supported by competent evidence and not in error.

¶ 30 Defendant also argues that the trial court's finding of plaintiff's income was not supported by competent evidence because plaintiff receives additional income from a family trust and support from her fiancé and mother. The trial court's finding of fact 48 states, "For the purpose of child support, the Court finds that the Plaintiff is earning $4,343.00 per month." For the purpose of child support actions, income includes any "maintenance received from persons other than parties to the instant action." *Spicer v. Spicer*, 168 N.C. App. 283, 288, 607 S.E.2d 678, 682 (2005). Further, the trial court *may* consider support from third parties but is not required to. *See Guilford Cnty. ex rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996). Here, a careful review of the evidence in the record and the trial court's full findings of fact indicate that the $4,343.00 per month attributed to plaintiff includes income from her family's trust and support from her fiancé. Thus, we conclude the trial court did not err in determining plaintiff's income.

VI. Conclusion

¶ 31 For the foregoing reasons we affirm the trial court's order in part and reverse and remand in part for further findings. We affirm the portions of the order in which the trial court awarded damages for breach of contract and attorney's fees to plaintiff. We vacate the portions of the order in which the trial court established child support at the contractual amount, $1,150.00 per month to plaintiff. We therefore remand the case to the trial court for further proceedings consistent with this opinion. The trial court may receive additional evidence for consideration on remand as needed to address the issues discussed in this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and COLLINS concur.

ZAHEER B. MUGHAL, Plaintiff
v.
LALLA R. MESBAHI, Defendant

No. COA20-667

Filed 16 November 2021

Appeal and Error—nonjurisdictional appellate rule—noncompliance—substantial and gross—dismissal warranted

In an appeal from a child support order, the parties' inclusion of unredacted confidential information—including the parties' social security numbers, bank account numbers, credit card numbers, and employer identification numbers, as well as their three minor children's social security numbers—in defendant's opening brief and in certain Rule 9(d) documentary exhibits constituted a substantial failure and gross violation of Appellate Rule 42(e), a nonjurisdictional rule. Consequently, the Court of Appeals dismissed the appeal and taxed double costs to the parties' attorneys, with each attorney being liable for one-half of the costs, and declined to invoke Appellate Rule 2 to reach the merits of the appeal.

Appeal by Defendant from order entered 13 January 2020 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 21 September 2021.

Bryant Duke Paris, III Professional Limited Liability Company, by Bryant Duke Paris III, for plaintiff-appellee.

Linck Harris Law Group, PLLC, by David H. Harris, Jr., for defendant-appellant.

MURPHY, Judge.

¶ 1 When a party fails to comply with our Rules of Appellate Procedure and that noncompliance rises to the level of a substantial failure and/or gross violation, we may exercise our discretion to impose an appropriate sanction under Rule 34. Here, both parties violated Rule 42(e) by repeatedly including unredacted confidential information in the case materials submitted to the Court via our online filing system. These violations constitute both substantial failures and gross violations of a nonjurisdictional rule. We exercise our discretion to impose appropriate sanctions and dismiss the appeal and tax double costs of the appeal to the attorneys for both parties. Defendant-Appellant's attorney shall be individually liable for one-half of the double costs. Plaintiff-Appellee's attorney shall be individually liable for one-half of the double costs. We have thoroughly considered the use of our Rule 2 discretion in this matter to reach the merits, but decline to do so.

BACKGROUND

¶ 2 Defendant-Appellant Lalla R. Mesbahi and Plaintiff-Appellee Zaheer B. Mughal were married on 12 March 2009. Plaintiff and Defendant separated on 1 November 2016 and divorced on 11 January 2019. Plaintiff and Defendant are the parents of three minor children. The parties have equal joint physical custody of the minor children.

¶ 3 Plaintiff commenced this action by filing a complaint on 27 September 2016. In response, on 6 December 2016, Defendant filed an answer and counterclaim for temporary and permanent child support. The trial court held a hearing on Defendant's claim for permanent child support on 2 December 2019. On 13 January 2020, the trial court filed its *Permanent Child Support Order*, and ordered "[e]ffective [1 January 2020], and continuing each month thereafter, Plaintiff shall pay to Defendant $594.00 per month in prospective child support." This amount was calculated using the North Carolina Child Support Guidelines based on Plaintiff's gross monthly income of $4,238.08 and Defendant's gross monthly income of $1,558.00. On 5 February 2020, Defendant timely filed a *Notice of Appeal*. On appeal, Defendant argues the trial court erred in calculating Plaintiff's gross monthly income.

¶ 4 On 8 May 2020, Plaintiff filed a notice that he would be representing himself in the appeal and on 3 June 2020, the trial court allowed Plaintiff's trial counsel to withdraw. Through counsel, Defendant timely served her proposed record on appeal to Plaintiff by United States postal service on 21 July 2020. In the interim, Plaintiff retained counsel and, through counsel, timely served Defendant with amendments to the proposed record on appeal by United States postal service on 24 August 2020. The amendments were received in Defendant's counsel's office on 28 August 2020. Defendant did not request judicial settlement of the proposed record on appeal. *See* N.C. R. App. P. 11(c) (2021) ("Within thirty days . . . after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement."). The proposed record on appeal would have been deemed settled by operation of law on 8 September 2020. *See id.* ("If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).").

¶ 5 On 3 September 2020, Defendant prematurely filed the *Record on Appeal* with this Court, omitting Plaintiff's amendments that were required to be included in the settled record on appeal pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure, as well as omitting Plaintiff's Rule 9(d) documentary exhibits. *See id.* ("If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal."). On 2 October 2020, Plaintiff filed a motion for leave to amend the *Record on Appeal.* We granted the motion, and on 16 October 2020, Defendant filed the *Amended Record on Appeal* and the *Rule 9(d) Documentary Exhibits* requested by Plaintiff. Defendant filed her opening brief on 4 December 2020. However, on 24 February 2021, Defendant filed a motion for leave to amend the

Rule 9(d) Documentary Exhibits because "[t]he submission inadvertently included documents not agreed to by the parties."[1] We granted the motion, and on 1 March 2021, Defendant filed the *Amended Rule 9(d) Documentary Exhibits*.

¶ 6 On 17 September 2021, we *sua sponte* entered the *Amended Order* ("September 2021 Order") striking the Amended Rule 9(d)(2) Supplement and Defendant's opening brief "for inclusion of unredacted identification numbers" in violation of Rule 42 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 42(e) ("Driver license numbers, financial account numbers, social security numbers, and tax identification numbers must be excluded or redacted from all documents that are filed with the appellate courts . . . ."). Both Defendant's appendix to her opening brief and the Rule 9(d) documentary exhibits requested by Plaintiff contained unredacted confidential information, such as the parties' unredacted social security numbers, bank account numbers, credit card numbers, and employer identification numbers, as well as the three minor children's unredacted social security numbers. In our September 2021 Order, we determined these violations of Rule 42

> constitute both substantial failures and gross violations of a nonjurisdictional rule. These failures and violations include, but are not limited to, the exposure to public inspection of identification numbers related not only to the parties, but also to their minor children from 4 December 2020 through this Court's sua sponte removal from the online filing system on 14 September 2021.

Defendant was further ordered to "show cause as to what sanction may be appropriate[.]"

ANALYSIS

¶ 7 Defendant argues "[t]he Rule 9(d) Documentary Exhibits are all [Plaintiff's] documents, submitted at the request of [Plaintiff's] counsel and were provided to [Defendant's counsel] by [Plaintiff's] counsel." As such, Defendant asserts her counsel "only glanced at [Plaintiff's] documents. Having been assured the documents [were] properly redacted, and having seen a couple of redactions, [Defendant's counsel] did not conduct a thorough search of the Rule 9(d) Documentary Exhibits." Defendant suggests "both attorneys are responsible for the nonredacted

1. Plaintiff's counsel notified Defendant's counsel of this error.

information" and concedes "[m]onetary damages may be appropriate." For the reasons discussed below, we have determined that the proper sanctions are to dismiss the appeal and tax double costs to the parties' attorneys, with one-half of the costs to Defendant's attorney, individually, and one-half of the costs to Plaintiff's attorney, individually.

¶ 8 "[R]ules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes. It necessarily follows that failure of the parties to comply with the rules . . . may impede the administration of justice." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (marks and citations omitted). "Compliance with the rules, therefore, is mandatory." *Id.* at 194, 657 S.E.2d at 362. "As a natural corollary, parties who default under the rules ordinarily forfeit their right to review on the merits." *Id.* at 194, 657 S.E.2d at 363.

¶ 9 However, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Id.* Where, as here, a nonjurisdictional default has occurred, "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365 (citations omitted). However, in some instances of nonjurisdictional defaults when the noncompliance rises to the level of a substantial failure or gross violation, dismissal will be an appropriate sanction. *Id.* at 199, 657 S.E.2d at 366. When presented with a nonjurisdictional default, we must perform a three-part analysis:

> [T]he court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Id. at 201, 657 S.E.2d at 367. "'[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules . . . is always a discretionary determination to be made on a case-by-case basis.'" *State v. Ricks*, 2021-NCSC-116, ¶ 5 (quoting *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017)).

¶ 10 In the September 2021 Order, we determined that Defendant's violations of the appellate rules, specifically Rule 42, "constitute both substantial failures and gross violations of a nonjurisdictional rule." As such, the first step of imposing a sanction for a nonjurisdictional default

is met. Rule 34(a)(3) provides, in pertinent part, that "the appellate [court] may . . . impose a sanction . . . when the court determines that . . . a petition, motion, brief, record, or other paper filed in the appeal . . . grossly violated appellate court rules." N.C. R. App. P. 34(a)(3) (2021). Rule 34(b)'s enumerated possible sanctions include dismissal, various types of monetary damages, and "any other sanction deemed just and proper." N.C. R. App. P. 34(b) (2021). "[T]he sanction imposed should reflect the gravity of the violation[,]" and entail this Court's discretionary "authority to promote compliance with the appellate rules[.]" *Dogwood*, 362 N.C. at 199, 200, 657 S.E.2d at 366.

¶ 11 Having considered sanctions permitted under Rule 34(b) other than dismissal, we conclude that, in a case such as this, dismissal is appropriate and justified. While the inclusion of Plaintiff's unredacted social security numbers, bank account numbers, credit card numbers, and employer identification numbers still rises to a level of substantial failure and gross violation of Rule 42, Plaintiff was in a place to protect himself from the disclosure of this information. He chose not to do so. The same cannot be said for the non-party minor children. Defendant included the three minor children's unredacted social security numbers alongside their full names and dates of birth in multiple places throughout Defendant's opening brief and Plaintiff did the same in the Rule 9(d) exhibits he requested. This is more than a mere oversight, as it created an opportunity for outside third parties to use our public records and filing system as a haven for potential identify theft. *See generally* N.C.G.S. § 132-1.10(a)(1) (2019) ("The General Assembly finds the following: The social security number can be used as a tool to perpetrate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual. While the social security number was intended to be used solely for the administration of the federal Social Security System, over time this unique numeric identifier has been used extensively for identity verification purposes and other legitimate consensual purposes."). The minor children were not in a position to protect themselves from this harm, and it was the parties' duty to shield this confidential information from public disclosure. Rule 42, by its very name, is for the purpose of protecting identities, and the parties' failure to comply with this rule created significant risks to the children. Due to the severity of this violation and to "promote compliance with the appellate rules," we conclude dismissal is the appropriate sanction. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Additionally, as both parties' attorneys are at fault for the violations, we tax double costs to the parties' attorneys, with one-half of the costs to Defendant's attorney, individually,

and one-half of the costs to Plaintiff's attorney, individually. N.C. R. App. P. 35(a) (2021) ("[I]f an appeal is dismissed, costs shall be taxed against the appellant unless otherwise . . . ordered by the court.").

¶ 12 Finally, we consider whether to invoke Rule 2 and review the merits of the appeal despite the gross and substantial violations of the appellate rules warranting our decision that dismissal is the appropriate sanction. *See Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367 ("If the court determines that the degree of a party's noncompliance with nonjurisdictional requirements warrants dismissal of the appeal under Rule 34(b), it may consider invoking Rule 2."). "[A]n appellate court may only invoke Rule 2 when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest." *Ricks*, 2021-NCSC-116 at ¶ 1. The order from which Defendant appeals requires Plaintiff to pay Defendant child support in an amount calculated using the North Carolina Child Support Guidelines. On appeal, Defendant argues the numbers used on the North Carolina Child Support Guidelines were incorrect. "[N]othing inherent in these circumstances indicates the exceptionality or manifest injustice necessary to justify suspending the appellate rules in order to reach the merits of [Defendant's] appeal." *Ramsey v. Ramsey*, 264 N.C. App. 431, 437, 826 S.E.2d 459, 464 (2019). Further, there is no merit to Defendant's argument. In the exercise of our discretion, we decline to invoke Rule 2.

CONCLUSION

¶ 13 Due to the severity of the substantial failures and gross violations of a nonjurisdictional rule, we dismiss this appeal. We decline to invoke Rule 2 to reach the merits of the appeal. The attorneys for both parties are responsible, in part, for the substantial failures and gross violations, and as a result, we also tax double costs of the appeal. Defendant's attorney shall be individually liable for one-half of the costs assessed and Plaintiff's attorney shall be individually liable for one-half of the costs assessed.

DISMISSED.

Judges INMAN and HAMPSON concur.

PURVIS v. PURVIS

[280 N.C. App. 345, 2021-NCCOA-616]

EDDIE DWAYNE PURVIS, Plaintiff
v.
CONSTANCE BAKER PURVIS, Defendant

No. COA20-884

Filed 16 November 2021

Divorce—equitable distribution—classification of property—marital—child's student loan debt

The trial court did not err by classifying student loan debt, which was acquired in plaintiff-husband's name during the marriage for the benefit of the parties' adult daughter, as marital property. The parties made a joint decision to incur the debt; defendant-wife actively participated in obtaining the loan, and the loan provided a joint benefit to the parties by covering their daughter's educational expenses.

Appeal by Defendant from order entered 18 September 2019 by Judge Warren McSweeney in Moore County District Court. Heard in the Court of Appeals 7 September 2021.

Van Camp, Meacham, & Newman, PLLC, by Whitney Shea Phillips Foushee, for Plaintiff-Appellee.

Kreider Law, PLLC, by Jonathan G. Kreider for Defendant-Appellant

WOOD, Judge.

¶ 1 Defendant Constance Purvis ("Defendant") appeals an order in which the trial court classified student loans acquired by the parties in the name of the Plaintiff Eddie Purvis ("Plaintiff") for the benefit of their adult daughter as marital property. After careful review of the record and applicable law, we affirm the order of the trial court.

I. Factual and Procedural Background

¶ 2 On September 24, 1988, Plaintiff and Defendant married. The parties separated on February 25, 2017. While the parties were married, they shared one joint bank account. The parties had a daughter who attended Sweet Briar College ("Sweet Briar") from 2009 until 2013. During her time at Sweet Briar, the parties' daughter acquired several student loans in her name, and Plaintiff acquired student loans in his name. The loans

Plaintiff acquired were administered through Great Lakes Educational Loan Services, Inc.[1] ("Great Lakes"). The Great Lakes loans were used by the parties' daughter for tuition, books, and living expenses.

¶ 3 Plaintiff contends that, although the Great Lakes loans were incurred in his sole name, the parties made a joint decision in acquiring the loans in question. According to Plaintiff's affidavit, the parties decided the Great Lakes loans would be in Plaintiff's name only due to a discrepancy in the parties' credit scores. Defendant is the one who completed and submitted the application for the loans and used her personal email address. Plaintiff did not use the Federal Student Aid website through which the loans were acquired. At some point, Defendant's mother co-signed loan documents for one of the Great Lakes loans.

¶ 4 Disbursements for the Great Lakes loans occurred on September 9, 2009 in the amount of $31,433.72; September 8, 2010 in the amount of $34,229.51; September 7, 2011 in the amount of $36,442.61; and September 12, 2012 in the amount of $42,441.84. The outstanding debt of the Great Lakes loans was $164,163.00 on the date of separation in 2017. The disbursements for the Great Lakes loans were made directly to Sweet Briar, and the parties used their joint bank account to make the payments on the Great Lakes loan.

¶ 5 On August 5, 2019, Defendant filed a motion for summary judgment, seeking a declaration that the Great Lakes loans were separate, rather than marital, property. The trial court denied Defendant's motion on September 18, 2019.[2] In its written order, the trial court found "there is no genuine issue of material fact to be resolved . . . and that partial summary judgment should be instead entered in favor of . . . Plaintiff declaring that the Great Lakes Student Loan . . . is marital property as a matter of law."

¶ 6 On March 20, 2020, the trial court entered its equitable distribution order, in which it found the Great Lakes loans were marital property.[3]

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1. Great Lakes is a student loan servicer chosen by the U.S. Department of Education to service federal student loans. Great Lakes provides federal borrowers with information concerning the repayment of their federal loans and manages the repayment of such loans. *See* Great Lakes Educational Loan Services, Inc., https://mygreatlakes.org/educate/knowledge-center/transferred-loan-questions.html.

2. It is from this order Defendant appeals. Defendant's notice of appeal does not indicate she appeals from the trial court's equitable distribution order entered on March 20, 2020.

3. Defendant does not appeal the trial court's equitable distribution order.

Plaintiff was assigned 75% of the outstanding balance of the loans, and Defendant was assigned 25% of the outstanding balance of the loans. Defendant filed her notice of appeal on June 18, 2020.

II. Discussion

¶ 7 In her sole argument on appeal, Defendant contends the trial court erred in classifying the Great Lakes loans as marital property. We disagree.

¶ 8 As a preliminary matter, we note that Defendant argues in her appellate briefing that she appeals from the trial court's equitable distribution order. Generally, an

> equitable distribution order is a final judgment of a district court in a civil action under N.C. Gen. Stat. § 7A–27(c) (2009). On appeal, when reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact "as long as they are supported by competent evidence." *Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 791 (1992). However, the trial court's conclusions of law are reviewed *de novo*. *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004). Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Mugno v. Mugno, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010). However, Defendant's written notice of appeal does not state she appeals the trial court's equitable distribution order entered on March 20, 2020; rather, Defendant appeals the trial court's summary judgment order entered on September 18, 2019. Accordingly, we review summary judgment orders *de novo*. *Raymond v. Raymond*, 257 N.C. App. 700, 708, 811 S.E.2d 168, 173 (2018) (citation omitted). Summary judgment "is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 708, 811 S.E.2d at 173-74 (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted)); *see also Harroff v. Harroff*, 100 N.C. App. 686, 689, 398 S.E.2d 340, 342-43 (1990) (citing *Ledford v. Ledford*, 49 N.C. App. 226, 228, 271 S.E.2d 393, 396 (1980)). As the parties dispute the trial court's classification of the Great Lakes loans as marital property and do not contend there are any genuine issues of material fact, we limit our review to the trial court's classification of the loans.

¶ 9 In accordance with the North Carolina Equitable Distribution Act, the trial court is statutorily mandated to determine whether property is marital, divisible, or separate property. *See* N.C. Gen. Stat. § 50-20 (2020). When making an equitable distribution determination,

> the trial court is required to follow a three-step analysis: (1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property.

Mugno, 205 N.C. App. at 277, 695 S.E.2d at 498 (citing *Little v. Little*, 74 N.C. App. 12, 16-20, 327 S.E.2d 283, 287-89 (1985)); *see also Turner v. Turner*, 64 N.C. App. 342, 345-46, 307 S.E.2d 407, 408-09 (1983).

¶ 10 In the present appeal, Defendant contends the trial court erred in classifying the Great Lakes loans as marital property because educational degrees are excluded from marital property for the purpose of equitable distribution. While Defendant correctly notes that our legislature excluded educational degrees under the definitions of marital and separate property, the question before this Court is whether the Great Lakes loans are a marital debt.

¶ 11 Notably, N.C. Gen. Stat. § 50-20 does not define "marital debt." N.C. Gen. Stat. § 50-20. However, Section 50-20 defines "marital property" as "property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property." N.C. Gen. Stat. § 50-20(b)(1); *see also Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Separate property, conversely, is "property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(2).

¶ 12 Debt, under North Carolina law, is not treated differently from assets. *Huguelet*, 113 N.C. App. at 536, 439 S.E.2d at 210. Thus, "[a] martial debt . . . is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Id.* (citations omitted). "The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was 'incurred during the marriage for the joint benefit of the husband and wife.' " *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181,

183 (1990) (quoting *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987)); *see also White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1995). Here, the parties do not dispute that the Great Lakes loans were incurred during the marriage and before the date of separation. The only issue before us is whether the loan was "for the joint benefit of the parties." *See Miller*, 97 N.C. App. at 79, 387 S.E.2d at 183.

¶ 13 While our Court has addressed the classification of a spouse's educational degree and its associated student loans, *see Haywood v. Haywood*, 106 N.C. App. 91, 99, 415 S.E.2d 565, 570 (1992) (holding "educational degrees, like professional degrees and business licenses, are personal to their holders . . . and are not property for the purposes of equitable distribution."), *modified*, 332 N.C. 342, 425 S.E.2d 696 (1993); *see also Baldwin v. Baldwin*, No. COA13-874, 232 N.C. App. 521, 2014 WL 636344 (N.C. Ct. App. Feb. 18, 2014) (unpublished) (holding that student loans incurred to further the plaintiff's education were separate property), no North Carolina court has considered student loan debt on these facts.

¶ 14 Other jurisdictions, however, have examined the issue of student loan debts acquired by one of the parties on behalf of adult children. In *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002), the Nebraskan appellate court held that a student loan incurred for the couple's adult child "was not incurred to satisfy an obligation of either party" and, thus, separate property. 11 Neb. at 449, 652 N.W.2d at 305. Similarly, in *Palin v. Palin*, 41 A.3d 248 (R.I. 2012), the Rhode Island Supreme Court held that student loans incurred by one spouse for the benefit of the parties' adult daughter was not marital debt. Notably, in both *McGuire* and *Palin*, the spouse arguing that student loans for the benefit of an adult child does not constitute marital property lacked prior knowledge of and did not consent to incurring the loans in question. *McGuire*, 11 Neb. at 448-49, 652 N.W. at 305; *Palin*, 41 A.3d at 257.

¶ 15 Conversely, in *Vergitz v. Vergitz*, 2007-Ohio-1395 (Ohio Ct. App. Mar. 23, 2007) (unpublished), an Ohio appellate court affirmed the classification of student loan debt incurred for an adult child as marital property. 2007-Ohio-1395, ¶ 13-16; *see also Cooper v. Cooper*, 2013-Ohio-4433 (Ohio Ct. App. Oct. 7, 2013) (unpublished). In *Vergitz*, the court noted, "The important point is the loans were debt incurred during the marriage" and "the loan agreement . . . could be treated as any other expenditure that married couples make." *Vergitz*, 2007-Ohio-1395, ¶ 13. In *Cooper*, the Ohio Court of Appeals held that student loan debt incurred during the marriage for the benefit of the parties' adult son was presumed marital. 2013-Ohio-443, ¶ 21. In so doing, the court noted "the mere fact

that the debt was in [the] [h]usband's name alone is not enough to establish that the debt was . . . separate debt." *Id.* We find the reasoning in *Vergitz* and *Cooper* persuasive and adopt it herein.

¶ 16 Here, the parties do not dispute that there was a joint agreement to incur the debt. Nor do the parties dispute that Defendant actively participated in obtaining the loans. The parties' affidavits demonstrate there was a joint benefit, in that their daughter's tuition, books, and living expenses were covered by the loan rather than out-of-pocket expenses. Further, "providing [their] daughter with a formal education was something that [they] both wanted and agreed, to do." Although this is not a tangible benefit in that the Great Lakes loans were not deposited in the parties' account, a tangible benefit is not required under North Carolina law. *Warren v. Warren*, 241 N.C. App. 634, 637, 773 S.E.2d 135, 137-38 (2015) ("Although our Courts have not specifically defined what constitutes a joint benefit in the context of marital debt, this Court has never required that the marital unit actually benefited from the debt incurred."). Accordingly, we hold the trial court did not err in classifying the Great Lakes loans as marital property, where the loans were obtained during the marriage for the parties' adult daughter.

III. Conclusion

¶ 17 After careful review of the record and applicable law, we affirm the order of the trial court. It is so ordered.

AFFIRMED.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
ARTHUR VLADIMIR KOCHETKOV, DEFENDANT

No. COA20-774

Filed 16 November 2021

Search and Seizure—search warrant application—affidavit—probable cause—undated screenshots of social media posts

A search warrant application established probable cause to search defendant's house for devices and documentation related to communicating threats and making a false report concerning mass violence on educational property, where the accompanying affidavit included information detailing defendant's past encounters with police and screenshots of defendant's Facebook posts that contained threatening content and references to schools. Further, the social media posts were not stale even though they had no dates or times on them, because the items to be seized included ones that had enduring utility to defendant.

Appeal by defendant from judgments and orders entered 15 July 2020 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson, for the State-appellee.

Appellate Defender Glen G. Gerding, by Assistant Appellate Defender Michele Goldman, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Arthur Vladimir Kochetkov appeals from a plea of guilty to five counts of second-degree sexual exploitation of a child. Defendant challenges the trial court's denial of his motion to suppress evidence. We affirm the trial court's order.

I. Background

¶ 2 This case arises from several posts made on a Facebook account with the name "Kochetkov Arthur." The Wake Forest Police Department ("WFPD") became aware of the relevant Facebook posts after being contacted by Officer Streb with the Town of Greece Police Department

("GPD") in New York. Officer Streb informed Corporal Chilton with the WFPD that Dean Stavalone, an acquaintance of defendant, had contacted the GPD about the Facebook posts. Screenshots of the Facebook posts, which are only viewable to the account owner's "Facebook friends," were sent to Corporal Chilton.

¶ 3 Corporal Chilton used the Facebook posts to obtain a warrant for defendant's arrest for Communicating Threats under N.C. Gen. Stat. § 14-277.1. However, the magistrate judge concluded there was not enough evidence to obtain an involuntary commitment order. The arrest warrant was executed on 17 September 2018; defendant was arrested but his home was not searched.

¶ 4 On 19 September 2018, Detective B.J. High with the WFPD applied for a search warrant of defendant's home. Items to be seized under the warrant were electronic devices including cell phones, computers, tablets, hard drives, USB drives, CDs, and disks; written documentation including any handwritten notes, printed notes, photographs, or documents in which a threat is communicated or which contain information or documentation about schools or other possible targeted areas of mass violence; and weapons to include handguns, long guns, weapons of mass destruction, or explosives. The crimes being investigated in conjunction with the search warrant were Communicating Threats, under N.C. Gen. Stat. § 14-277.1, and Making a False Report Concerning Mass Violence on Educational Property, under N.C. Gen. Stat. § 14-277.5. The search warrant application included screenshots of the Facebook posts obtained from the GPD and outlined defendant's prior encounters with the WFPD. Wake County Superior Court Judge Andrew Heath found the search warrant application demonstrated probable cause and issued a search warrant of defendant's home.

¶ 5 On 19 September 2018, the WFPD executed the search warrant and searched defendant's home. One of the items seized in the search was defendant's cell phone. While conducting a forensic search of the cell phone, images of alleged child pornography were found. These images led to a subsequent search warrant and search of defendant's home, ultimately leading to defendant being charged and indicted with five counts of Second-Degree Sexual Exploitation of a Child.

¶ 6 On 29 July 2019, defendant filed a motion to suppress alleging the information provided in the affidavit supporting the search warrant application was stale, the warrant was insufficient because Mr. Stavalone's veracity was not established, the Facebook posts did not support the crimes alleged, and that there was not a nexus between defendant's

home and potential evidence to be seized. The motion did not come on for hearing until 1 June 2020. Following the hearing on the motion, the trial court denied defendant's motion to dismiss. On 15 July 2020, defendant pled guilty to all five counts of Second-Degree Sexual Exploitation of a Child, having given prior proper notice of his intention to appeal the trial court's order on his motion to dismiss. Defendant filed a written notice of appeal on 27 July 2020.

II. Discussion

¶ 7 "We review an order denying a motion to suppress to determine whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017) (cleaned up).

¶ 8 The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. Generally, the police need a warrant to conduct a search or seizure in a home, and a warrant may be issued only after a showing of probable cause. *See Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639 (1980). Article I, Section 20 of the Constitution of North Carolina similarly prohibits unreasonable searches and seizures and requires a showing of probable cause to issue a warrant. *See State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984).

¶ 9 The totality of the circumstances test is used to determine whether probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527 (1983); *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260-61 (adopting the federal test for evaluating probable cause). "To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw reasonable inferences from the available observations." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) (cleaned up). To support a magistrate's finding of probable cause, the evidence need not be conclusive, so long as all the evidence together "yields a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched." *Id.*

¶ 10 A magistrate's probable cause determination should not be subject to *de novo* review, instead the magistrate's probable cause determination should be given "great deference." *Id.* (citations omitted). The duty of a reviewing court is to ensure that the magistrate had a "substantial basis for concluding that probable cause existed." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (cleaned up).

¶ 11 An application for a search warrant must be accompanied by, among other things, "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items [to be seized] are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(3) (2020). "A supporting affidavit is sufficient when it gives the magistrate reasonable cause to believe that the search will reveal the presence of the items sought on the premises described in the warrant application, and that those items will aid in the apprehension or conviction of the offender." *Allman*, 369 N.C. at 294, 794 S.E.2d at 304. A magistrate cannot lawfully issue a search warrant based on a "purely conclusory" affidavit that does not state the underlying circumstances allegedly giving rise to probable cause. *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980).

¶ 12 The affidavit in this case, which was submitted by Detective High, contained all of the following allegations: screenshots of the Facebook posts allegedly made by defendant, which contained vague threats of violence, references to local schools, and defendant's military training; descriptions of the WFPD's prior encounters with defendant, which over the span of three years includes serving involuntary commitment orders, welfare checks, tips received from the Federal Bureau of Investigation based on Facebook posts defendant made, an arrest for posting threats to law enforcement on Facebook (although no probable cause was found in that case); and the issuance of a warrant for defendant's arrest for Second-Degree Trespassing after defendant was allegedly seen photographing locks on doors at a local elementary school, which is located adjacent to defendant's home.

¶ 13 In addition to stating these allegations, the affidavit recited Detective High's law enforcement training and experience. The affidavit also described how the WFPD became aware of defendant's alleged Facebook posts and obtained screenshots of the posts. Additionally, the affidavit provided information on how and why Detective High knew the address listed on the affidavit was defendant's residence.

¶ 14 Defendant first argues that the trial court erred in denying his motion to suppress evidence, because the affidavit did not establish probable cause he committed the designated offense. Defendant asserts that the Facebook posts did not provide enough evidence to establish the elements of Communicating Threats nor did the Facebook posts directly or indirectly communicate a threat to the person to be threatened. However, defendant mischaracterizes the standard to issue a search warrant. Probable cause does not require evidence of every element of a crime. To find probable cause exists, a magistrate need only "make a

practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002).

¶ 15 As discussed above, the affidavit in this case included screenshots of Facebook posts allegedly made by defendant which contained content relating to threats, violence, and referencing schools, as well as information of defendant's prior encounters with the police, including an arrest for trespassing at a nearby elementary school. We conclude that this information is sufficient to support a magistrate's finding, under the totality of the circumstances test, that evidence of a crime may be found at the place to be searched and in the items to be seized.

¶ 16 Defendant also argues that the information listed in the affidavit was stale because it failed to establish when the Facebook posts were made or discovered. "The general rule is that no more than a 'reasonable' time may have elapsed. The test for 'staleness' of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (citations omitted). "Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock." *Id.* at 566, 293 S.E.2d at 834 (cleaned up). "As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant." *Id.* However, courts have expanded these time limits when the items to be seized include items with enduring utility to the defendant beyond criminal activity and the defendant is not likely to dispose of the items, such as computers, computer equipment, camera equipment, etc. *See Pickard*, 178 N.C. App. 330, 336, 631 S.E.2d 203, 207–08 (2006).

¶ 17 Defendant contends that because the screenshots of the Facebook posts do not include dates and times, nor did the affidavit provide information as to when Mr. Stavalone provided the information to the police, we must find the information to be stale because no determination as to how much time has elapsed can be made. In contrast, the State argues that because of the nature of the posts and their inclusion in a "course of conduct" the exact age of the posts is less critical to the validity of probable cause in connection with the specific items subject to a search here. The search warrant provided the items to be seized were electronic devices to include cell phones, computers, tablets, hard drive devices, USB

drives, CDs, and disks; written documentation to include any handwritten notes, printed notes, photographs, or other documents; and weapons to include handguns, long guns, weapons of mass destruction, or explosives. Because the items to be seized included items with enduring utility, like those listed to be seized in cases such as *Pickard* where the time period for staleness was determined to be several months or longer, we conclude the information was not stale, despite the lack of date and time information. *See id.*

¶ 18 Finally, defendant argues that the trial court erred because its order did not find that the affidavit supplied probable cause to believe that the designated crimes had occurred or were about to occur. Instead, the trial court concluded that "the affidavit sufficiently established that the evidence sought was relevant to the investigation of the defendant." Defendant contends that nowhere in its order did the trial court find the affidavit established probable cause. Defendant's argument and contentions lack merit. While the trial court's order did conclude that the evidence sought was relevant to the investigation, the order also explicitly found that the affidavit established probable cause in finding of fact 16 and conclusion of law 2. Therefore, we dismiss this argument.

III. Conclusion

¶ 19 For the foregoing reasons we affirm the trial court's order denying defendant's motion to suppress because the trial court properly found the affidavit supported the magistrate's finding of probable cause and the trial court applied the proper standard in its order.

AFFIRMED.

Judges DIETZ and COLLINS concur.

STATE v. METCALF

[280 N.C. App. 357, 2021-NCCOA-618]

STATE OF NORTH CAROLINA
v.
JESSICA LEA METCALF, DEFENDANT

No. COA20-917

Filed 16 November 2021

1. Constitutional Law—right to impartial jury—motion to strike jury venire—passing remark by trial court

The trial court in a prosecution for involuntary manslaughter properly denied defendant's motion to strike the jury venire where, when addressing the jury pool before jury selection, the court inadvertently mentioned that defendant's attorneys were from the public defender's office. The jury pool could not have reasonably inferred that this single, passing reference was an opinion on a factual issue in the case, defendant's guilt, or the weight or credibility of the evidence, and therefore the court's remark neither violated defendant's right to a fair trial before an impartial jury nor warranted a new trial.

2. Homicide—involuntary manslaughter—culpable negligence—proximate cause—sufficiency of evidence

In a prosecution where defendant was charged with involuntary manslaughter for leaving her boyfriend's three-year-old nephew inside a burning trailer home, the trial court properly denied defendant's motion to dismiss the charge for insufficiency of the evidence. Substantial evidence showed defendant was culpably negligent in her rescue efforts where she admitted that she could have removed the child from the burning trailer when she left to retrieve water but did not and then repeatedly told neighbors and firefighters at the scene that nobody was inside the trailer, and where she engaged in risk-creating behavior by overdosing on Xanax that day despite knowing the child would be in her care. The evidence also showed that defendant's acts proximately caused the child's death where the child was still alive when defendant left the trailer and where any harm resulting from defendant's acts was foreseeable.

3. Indictment and Information—short-form indictment—involuntary manslaughter—sufficiency

A short-form indictment for involuntary manslaughter was not fatally defective where it met the pleading requirements set forth in N.C.G.S. § 15-144—which provides that an indictment for manslaughter is sufficient if it alleges that a defendant feloniously

and willfully killed and slayed the victim—and where the constitutionality of such short-form indictments had been upheld in prior case law.

Appeal by Defendant from judgment entered 23 August 2019 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Anne Bleyman for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Jessica Lea Metcalf appeals from a judgment entered upon a jury verdict finding her guilty of involuntary manslaughter of a three-year-old child, Archie.[1] On appeal, Defendant contends that the trial court erred by (1) denying Defendant's motion to strike the jury venire; (2) failing to grant Defendant's motion to dismiss for insufficient evidence; and (3) failing to dismiss the indictment due to insufficient notice. Upon review, we hold that Defendant received a fair trial, free from error.

I. Factual and Procedural History

¶ 2 In January 2015, Defendant cohabitated in a trailer home with her boyfriend, Brandon Rathbone, in Buncombe County. The trailer home had no running water because the well pump "froze and busted" in the cold. The trailer home also had no house telephone, and Defendant's cell phone had minimal service. Defendant stated that an electric heater was used to heat the trailer when it was cold, and that the trailer's wall would get hot when Defendant and Mr. Rathbone used the heater.

¶ 3 Archie was Mr. Rathbone's nephew. On or around 20 January 2015, Archie came to stay with Mr. Rathbone and Defendant for several days while Archie's mother was hospitalized to give birth to another child. Mr. Rathbone's parents, Wanda and Stephen Neil, lived nearby. Typically, Mr. or Mrs. Neil would pick up Archie between 8:30 and 9:30 a.m. to care for Archie while Mr. Rathbone was at work. Defendant had taken time

1. We use a pseudonym to protect the anonymity of the child and for ease of reading. *See* N.C. R. App. P. 42.

off of work to watch Archie when Mrs. Neil, Mr. Neil, and Mr. Rathbone were unwilling to do so.

¶ 4 At approximately 7:00 p.m. on 27 January 2015, Defendant took four tablets of Xanax, although Defendant stated she was only allowed to take "up to three [tablets] a day." Defendant also stated she could not remember if she had gotten up in the middle of the night to take more Xanax. Between 6:00 and 6:15 a.m. on the following morning, Mr. Rathbone left home for work like he did every day. After Mr. Rathbone left for work, Defendant heard Archie moving around, checked on him, and noticed Archie had wet the bed, so she changed his pants.

¶ 5 At approximately 7:00 a.m., Defendant turned on the heater in the living room. After watching television for some time, Defendant went to the bathroom and "smoked about a half of a cigarette." Defendant stated that she would only smoke outside or in the bathroom. Upon returning to the living room, Defendant observed that sparks were coming from either the heater or the electric outlet and that the sparks were already burning holes in the couch cushions. The couch was already smoking from the sparks.

¶ 6 In an attempt to stop the burning, Defendant grabbed a blanket to smother the fire; however, the blanket caught fire and stuck to Defendant's hands and burned her. Defendant stated that she did not immediately get Archie out of the trailer home because she believed that she could put out the fire. Defendant stated she went to the front door and yelled for help. Defendant then went to the kitchen to look for water to extinguish the fire, but there was no running water in the mobile home. Defendant stated that "usually they keep several gallons [of water] in the kitchen area, but they were empty." After finding a bleach jug on the dryer, Defendant returned to the front door to call for help again. Mr. Rathbone stated there were two fire extinguishers under the kitchen counter. Defendant "tried to use the fire extinguisher but it didn't work [because] [s]he squeezed the trigger, but she didn't pull the pin out."

¶ 7 Defendant stated a neighbor, Tammy Peek, arrived at the burning structure and escorted Defendant down a hall and out of the back door of the trailer home. Ms. Peek claims this occurred around 8:20 a.m. Ms. Peek, however, stated that Defendant was already standing in the yard outside of the burning trailer home when Ms. Peek arrived at the scene, and that Ms. Peek never entered the trailer home. Furthermore, Defendant claimed that she repeatedly mentioned her purse and Archie to Ms. Peek as they exited the trailer home together, but Defendant could not remember if she was speaking out loud or only thinking about the

purse and Archie in her head. Conversely, Ms. Peek stated that she asked Defendant if anyone else was in the home, and Defendant said no, that "her children . . . were with their father[.]" Ms. Peek stated Defendant was asked "numerous times . . . [on] [a]t least four or five" occasions if anyone was in the trailer, and that Defendant replied "there's no one in the home."

¶ 8 Defendant stated that she could have gotten Archie out of the trailer home when she exited, but Defendant did not get Archie out because "she thought she could put the fire out."

¶ 9 Ms. Peek ran back to her house approximately 130 to 150 feet away from the burning trailer home, woke her sleeping boyfriend Billy Boyd, and called 911 with her cell phone. After placing the 911 call, Ms. Peek and Mr. Boyd returned to the burning trailer home where Defendant remained standing in the front yard. Again, Ms. Peek and Mr. Boyd asked Defendant if there was anyone else in the home. Even after being asked "multiple times" if there was anyone in the house, "[Defendant] consistently told [Ms. Peek and Mr. Boyd] no." Ms. Peek stated that Defendant asked for her cell phone and uniforms. Mr. Boyd observed that Defendant's face looked as though something "blew up" on it. Defendant then asked for a cigarette and when Ms. Peek gave her one, Defendant put it in her mouth backward, with the "tobacco part in, [and was] going to light the filter." Mr. Boyd then departed to inform Mr. Neil about the fire.

¶ 10 Mr. Neil and Mr. Boyd met outside the Neil home, and Mr. Boyd told Mr. Neil about the fire. Mrs. Neil informed Mr. Rathbone that his home was burning after Mr. Neil reported the incident. When Mr. Boyd asked Mr. Neil if there were any children in the trailer home, Mr. Neil answered that Archie was there. Mr. Neil then called 911 to inform emergency services that someone was inside the trailer home. Mr. Boyd and Mr. Neil departed the Neil home together to return to the burning trailer home. Mrs. Neil was unable to make it to the burning trailer home. Upon arriving at the trailer home, Mr. Neil asked Defendant where Archie was, and Defendant replied, "his daddy had him."

¶ 11 Shortly after the initial dispatch call, 911 communications dispatched firefighters from the Leceister Fire Department. Jeff Keever and Joshua Reeves were the initial firefighters on the scene. Keever stated he and Reeves were notified by dispatch while en route of a possible child entrapment in the trailer home. Keever estimated he arrived at the fire approximately three to four minutes after receiving the call. Upon arriving at the scene, Keever observed Defendant and Ms. Peek in

the driveway, and the trailer presented "heavy smoke and heavy fire." Although Keever's focus upon arrival was on the entrapment, Keever asked for confirmation from Defendant. When asked if there was anybody still inside, Defendant stated that "[t]he kids are with their daddy." In response, Keever erroneously "notified all dispatch that there was no confirmed entrapment." Despite Defendant's misinformation, Keever stated that with their next help "about 15 minutes away" and "with that much involvement and that much smoke . . . that there is a point of no return." Clarifying, Keever stated that "there wouldn't have been any life in there. . . . [W]e would have been risking our lives to go in there and try to save nothing."

¶ 12 During this time, Reeves attempted to get control of the fire and was interrupted by Mr. Neil, whom Reeves had to wrestle off the porch of the trailer home. According to Reeves, Mr. Neil was adamant that Archie was in the home. Reeves also stated at that time, "[t]here was no hope of going inside" and that "[Reeves] wouldn't have survived going into that room with [his] gear on much less letting [Mr. Neil] go inside without it." Christopher Brown, the Chief of Leicester Volunteer Fire Department, arrived and assumed command of the scene. Chief Brown reported that once the firefighting crews gained access to the structure, they located the deceased child on the bedroom floor of the trailer home.

¶ 13 Breena Williams, an arson investigator with the Asheville-Buncombe Arson Task Force at the time of the incident, obtained a search warrant for the trailer home and obtained approval to move Archie's body. Williams later observed Dr. Jerri McLemore perform an autopsy of Archie's body. Dr. McLemore observed extensive "thermal injuries or thermal changes of the outside of the body" and a carbon monoxide presence in Archie's blood in excess of sixty percent. Dr. McLemore noted that "going over 50 percent" is "basically lethal." Dr. McLemore then made a finding and diagnosis that the ultimate "cause of death was smoke and fume inhalation."

¶ 14 During initial trial proceedings, the trial court judge inadvertently mentioned that Defendant's attorneys were from the public defender's office. The trial judge briefly stated on a single instance, "Ms. McLendon is with the public defender's office also," in front of the jury, but never again made reference to defense counsel's office in front of the jury throughout the remaining proceedings. Defendant's counsel requested the trial court strike the entire jury venire. The trial court denied the motion, unless the parties could show any type of appellate decision showing the identification of public defenders as reversible error. Defendant moved to dismiss the charges against her for insufficient evidence at

the close of the State's evidence and again at the close of Defendant's evidence. The trial court denied both motions.

¶ 15 The jury convicted Defendant on one count of involuntary manslaughter. Because the jury was unable to reach a verdict on Defendant's child abuse charge, the trial court declared a mistrial as to that charge. Defendant orally provided notice of appeal in open court.

II. Analysis

¶ 16 Defendant raises three issues on appeal. First, Defendant contends that the trial court erred in denying her motion to strike the jury venire, because it denied her right to a fair trial before an impartial jury. Second, Defendant argues that her involuntary manslaughter conviction must be vacated because the State did not meet its burden of proving that Defendant's criminally negligent actions proximately caused Archie's death. Third, Defendant asserts that the short-form indictment charging Defendant with involuntary manslaughter was fatally defective for lack of sufficient notice of involuntary manslaughter's essential elements.

A. Jury Venire

¶ 17 **[1]** Defendant challenges the fairness of her trial due to the trial court denying Defendant's motion to strike the jury venire after the trial judge inadvertently mentioned Defendant's counsel was from the public defender's office on a single occurrence prior to jury selection.

¶ 18 "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced [the] defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984). The defendant "bears the burden of establishing that the trial judge's remarks were prejudicial." *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990) (citing *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985)). "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

¶ 19 The single passing reference made under these facts does not warrant a new trial. The jury could not reasonably infer the trial court's introduction of the parties to be an opinion on a factual issue in the case, Defendant's guilt, nor the weight of the evidence or a witness's credibility. *See id.* Defendant speculates that the status of a public defender may prejudice a defendant, citing only a single law review article to support

this assumption. Regardless, it is apparent from the Record that the jury participated in reasoned decision-making based on the merits of the case, as the jury convicted Defendant of involuntary manslaughter but failed to convict on felonious negligent child abuse, prompting a mistrial as to the latter charge. Defendant's challenge to the jury venire fails.

B. Sufficiency of the Evidence

¶ 20 **[2]** Next, Defendant claims that the State failed to meet its burden of proof that a criminally negligent act by Defendant was the proximate cause of Archie's death. Claiming the State "failed to meet its burden of proof" is synonymous with, and the foundation of, a motion to dismiss for insufficient evidence. N.C. Gen. Stat. § 15A-1227 (2019); *State v. Scott*, 356 N.C. 591, 594, 573 S.E.2d 866, 868 (2002) (stating that "the State has not met this burden" when announcing its holding under N.C. Gen. Stat. § 15A-1227). "Rule 10(a)(3) [of the North Carolina Rules of Appellate Procedure] provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). A defendant may properly preserve all issues related to the sufficiency of the evidence for appellate review by making a proper motion to dismiss on those issues at the close of the State's evidence, and by subsequently renewing the motion to dismiss at the close of all evidence in accordance with Rule 10(a)(3). N.C. R. App. P. 10(a)(3).

¶ 21 Here, Defendant properly preserved the issue by moving to dismiss at the close of the State's evidence as well as the close of Defendant's evidence in accordance with Rule10(a)(3). We review the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016).

¶ 22 "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant[] being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). If substantial evidence exists for each essential element and as to the defendant's identity as the perpetrator, "the motion [to dismiss] is properly denied." *Id.* "'[S]ubstantial evidence' . . . mean[s] that the evidence must be existing and real, not just seeming or imaginary." *Id.* at 99, 261 S.E.2d at 117. Put differently, "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

¶ 23 When the trial court reviews a defendant's motion to dismiss for lack of substantial evidence, the evidence must be viewed "in the light most favorable to the State," giving the State the benefit of all reasonable inferences. *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and internal quotation marks omitted). Contradictions or discrepancies in the evidence "are for the jury to resolve[.]" *Id.* "[T]he trial court is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). The "combination of direct and circumstantial evidence" may be used in reviewing a trial court's assessment of sufficiency of the evidence to survive a defendant's motion to dismiss. *State v. Blagg*, 377 N.C. 482, 490, 858 S.E.2d 268, 274 (2021).

¶ 24 Because Defendant does not contest her identity as the principal actor in the events leading up to Archie's death, we do not review whether there is substantial evidence on the record as to Defendant's identity. This Court's inquiry now turns to the issue of whether there is "such relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion" of guilt for each essential element of involuntary manslaughter. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. McGee*, 234 N.C. App. 285, 289, 758 S.E.2d 661, 664–65 (2014) (citation and internal quotation marks omitted). Culpably negligent acts and culpable omissions to perform a legal duty are both equally sufficient to satisfy the second element of proximate cause. *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977). Defendant concedes Archie's death was unintentional and "tragic," but contests the sufficiency of the State's evidence for element two. For the reasons discussed below, we hold that there is substantial evidence in the Record that Defendant's culpably negligent acts and omissions proximately caused Archie's unintentional death and that the evidence was sufficient to send the case to the jury. The trial court did not err when it denied Defendant's motion to dismiss.

1. Substantial evidence exists to support a reasonable finding that Defendant's acts and omissions were culpably negligent.

¶ 25 "[C]ulpable negligence . . . must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *State v. Debiase*, 211 N.C. App. 497, 505, 711 S.E.2d 436, 442 (2011) (quoting *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977)).

¶ 26 While "citizens generally have no duty to come to the aid of one who is injured" or otherwise in harm's way, "once [a] defendant [makes] efforts to aid the victim, he [is] under a duty to do so with due caution." *In re Z.A.K.*, 189 N.C. App. 354, 358–59, 657 S.E.2d 894, 896–97 (2008). For example, this Court found that an instance when a land owner gave misleading directions to emergency services, thereby delaying possible rescue, was "evidence that [the] defendant[] did not use ordinary care." *Hawkins v. Houser*, 91 N.C. App. 266, 270, 371 S.E.2d 297, 299 (1988). In another case, *In re Z.A.K.*, this Court found a "defendant's actions were even more egregious than [*Hawkins*,]" when, "[a]fter the victim first became ill . . .[,] [the] defendant *lied* to his father, telling him that everything was fine and sending him away." *In re Z.A.K.*, 189 N.C. App. at 360, 657 S.E.2d at 897 (emphasis added). This Court held "[a]t the very least, [the defendant's] affirmative conduct precluded any other rescuer from rendering the aid allegedly necessary to prevent [the victim's] . . . injuries. At the worst, it actively caused her death." *Id.* (citation omitted).

¶ 27 Here, there is substantial evidence sufficient for a reasonable juror to find that Defendant was culpably negligent in her rescue attempts. Specifically, Defendant admitted that she could have removed Archie from the burning home when Defendant exited to retrieve water from outside. Additionally, and similar to *In re Z.A.K.*, there is substantial evidence from which a reasonable juror could conclude that Defendant's omissions to her neighbors and the firefighters regarding Archie's presence in the burning home "[a]t the very least . . . precluded any other rescuer from rendering the aid allegedly necessary to prevent [the victim's] . . . injuries. At the worst, it actively caused [the victim's] death." *Id.* (citation omitted). Defendant stating "[t]he kids are with their daddy" and failing to mention Archie in any way could lead a reasonable juror to conclude Defendant was culpably negligent in her rescue attempts. This Court "is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight." *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925.

¶ 28 In addition to substantial evidence of Defendant's culpably negligent rescue attempts, there is substantial evidence in the Record that Defendant took more Xanax in a day than Defendant's prescription directed. There is also substantial evidence in the Record that Defendant was aware she was designated as the caretaker for Archie the morning of Archie's death, because she took time off from work to do so. Taking a higher than prescribed dose of Xanax in anticipation of serving as Archie's caretaker was a risk-creating behavior. This Court has stated,

> Risk-creation behavior thus triggers duty where the risk is both unreasonable and foreseeable. . . . The orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty. A duty arises based on evidence showing that a defendant should have recognized that [a victim], or anyone similarly situated might be injured by their conduct.

In re Z.A.K., 189 N.C. App. at 359, 657 S.E.2d at 897. As Archie's intended caretaker for the morning of his death, and as a creator of risk by over-consuming Xanax, Defendant had duties to Archie.

¶ 29 It is not this Court's duty to weigh the evidence or pinpoint where a reasonable jury must have concluded culpable negligence was manifest. It is sufficient to say there was substantial evidence to allow the jury to determine the presence of acts or omissions adequate to satisfy the culpable negligence element of involuntary manslaughter.

2. Substantial evidence exists to support a finding that Defendant's culpably negligent acts proximately caused Archie's death.

¶ 30 Proximate cause is a cause "from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *State v. Cole*, 343 N.C. 399, 416, 471 S.E.2d 362, 370 (1996) (quoting *State v. Powell*, 336 N.C. 762, 771, 446 S.E.2d 26, 31 (1994)). "Foreseeability is an essential element of proximate cause." *Id.* The defendant need not actually foresee the precise injurious outcome, but "in the exercise of reasonable care, [if] the defendant might have foreseen . . . [some] consequences of a generally injurious nature" the cause may be deemed sufficiently foreseeable to be a proximate cause. *Id.* Giving the State the benefit of all reasonable inferences, there was substantial evidence from which a reasonable juror could conclude that Defendant's culpably negligent acts proximately caused Archie's death.

¶ 31 The Record tended to show that Archie was alive during the fire. Archie's airway was coated with soot, and his blood contained a lethally high level of carbon monoxide in excess of sixty percent. "That's one indication that [Archie] was alive at the time of the fire" and "there had to have been active breathing [by Archie]." There was evidence that Archie was located "on [his] back on the floor" during the fire, when "the carbon monoxide and the smoke[] fumes tend[] to rise." Further evidence in the Record indicates that "there was at least some period of time . . . that [Archie] would have been alive during the course of the fire."

¶ 32 Assuming all inferences in favor of the State, there is substantial evidence in the Record sufficient for a reasonable juror to conclude that a person "in the exercise of reasonable care" would have foreseen Archie's potential injury or death resulting from Defendant's failure to remove Archie from the burning home with Defendant upon her exiting the home. *Cole*, 343 N.C. at 416, 471 S.E.2d at 370. Additionally, there is substantial evidence that a reasonable person would foresee that stating "[t]he kids are with their daddy" while failing to mention Archie's presence in the fire to anyone would likely stifle potential rescue attempts, thereby causing injury or death. Furthermore, there is substantial evidence that Archie was alive during Defendant's exit from the home and for some time as the fire escalated, due to the soot in Archie's airway and carbon monoxide in Archie's blood. While the specific moment of death is uncertain, there was substantial evidence of foreseeability and causation which was properly weighed by the jury to determine the element of proximate cause.

¶ 33 For the foregoing reasons, the trial court did not err when it denied Defendant's motion to dismiss for insufficient evidence.

C. Indictment Sufficiency

¶ 34 **[3]** Defendant asserts for the first time on appeal that Defendant's short-form indictment for involuntary manslaughter was fatally flawed for insufficiently alleging the essential elements of the offense, thereby denying the trial court jurisdiction to hear the proceeding. Typically, "[a] defendant waives an attack on an indictment when the validity of the indictment is not challenged in the trial court." *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 437 (2000). However, "[w]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016) (citation and internal quotation marks omitted). When "[t]he alleged failure of a criminal pleading to charge the essential elements of a stated offense" is made, as Defendant does in this appeal, the alleged failure "is an error of law that this Court reviews de novo." *Id.*

¶ 35 N.C. Gen. Stat. § 15-144 states in pertinent part that "it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay [the alleged victim], and concluding as aforesaid." N.C. Gen Stat. § 15-144 (2019). The constitutionality of this statutory short-form indictment has been upheld by this Court and our Supreme Court, a point which Defendant concedes. *Braxton*, 352 N.C. at 174–75,

531 S.E.2d at 437–38; *State v. Reynolds*, 160 N.C. App. 579, 583, 586 S.E.2d 798, 801 (2003). Accordingly, this Court must sustain the sufficiency of the indictment.

III. Conclusion

¶ 36 For the foregoing reasons, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges ARROWOOD and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 NOVEMBER 2021)

A. MAYNOR HEATING & AIR CONDITIONING, INC. v. GARDNER 2021-NCCOA-619 No. 20-837	Wake (19CVS17121)	Affirmed
AYSCUE v. GRIFFIN 2021-NCCOA-620 No. 20-807	Bertie (14CVS45)	Dismissed
CAMBRE v. REG'L IMAGING, P.A. 2021-NCCOA-621 No. 21-58	Cumberland (20CVS2804)	Dismissed
DAVIS v. VISTA N. CAROLINA LTD. P'SHIP 2021-NCCOA-622 No. 20-791	Rutherford (17CVS442)	Dismissed
FUND 19-MILLER, LLC v. ISBILL 2021-NCCOA-623 No. 21-78	Mecklenburg (19CVS19892)	Affirmed
GINGRAS v. STOKES 2021-NCCOA-624 No. 21-257	Henderson (19CVD243)	Dismissed
GORLESKY v. CABARRUS CNTY. DEP'T OF SOC. SERVS. 2021-NCCOA-625 No. 20-875	Wake (17CVS7610)	Affirmed
IN RE A.L. 2021-NCCOA-626 No. 21-245-2	Robeson (19JA237)	Affirmed.
IN RE C.L.M. 2021-NCCOA-627 No. 21-270	Guilford (20JA39) (20JA43)	Affirmed
IN RE S.C.J. 2021-NCCOA-628 No. 21-240	Durham (20SPC1933)	Affirmed
IN RE T.-N. J.J. 2021-NCCOA-629 No. 21-330	Pitt (20JA200) (20JA201) (20JA202)	Affirmed in part; Vacated in part, and Remanded.

IN RE T.C.M. 2021-NCCOA-630 No. 21-242	Moore (21JA03)	Affirmed
JBL COMMC'NS, INC. v. AMCO INS. CO. 2021-NCCOA-631 No. 20-417	Madison (18CVS60)	Affirmed
JONES v. JONES 2021-NCCOA-632 No. 21-105	Davie (20CVD66)	Vacated and Remanded.
McKOY v. ROBINSON 2021-NCCOA-633 No. 21-53	Cumberland (20CVD50)	Dismissed
PERALES v. KING 2021-NCCOA-634 No. 20-786	Wake (18CVD11748)	AFFIRMED IN PART, VACATED IN PART, AND REMANDED.
ROACH v. ROACH 2021-NCCOA-635 No. 21-279	Forsyth (18CVD5403)	Vacated and Remanded
SCOTT v. SCOTT 2021-NCCOA-636 No. 21-108	Orange (99CVD1586)	Affirmed
SHARPE v. FCFS NC, INC. 2021-NCCOA-637 No. 21-183	Alamance (19CVS1742)	Reversed and Remanded
STATE v. BROOKS 2021-NCCOA-638 No. 20-749	Lincoln (19CRS428-429) (19CRS50711-12)	New Trial
STATE v. CRANDALL 2021-NCCOA-639 No. 20-578	Wake (19CRS204073)	No Error
STATE v. DRIVER 2021-NCCOA-640 No. 20-851	Mecklenburg (17CRS208590-92) (17CRS208594) (17CRS7388)	Vacated and Remanded in Part; No Error in Part.
STATE v. FULLER 2021-NCCOA-641 No. 21-9	Orange (17CRS50340)	Vacated and Remanded

STATE v. LAWSON 2021-NCCOA-642 No. 20-863	Stokes (17CRS50208)	Affirmed.
STATE v. LINDQUIST 2021-NCCOA-643 No. 21-92	Cumberland (17CRS57328-29)	Affirmed.
STATE v. MOORE 2021-NCCOA-644 No. 20-669	Lincoln (17CRS52083) (17CRS52087-92) (19CRS195-196)	Remanded
STATE v. PHILLIPS 2021-NCCOA-645 No. 21-39	Mecklenburg (17CRS203531) (17CRS203533)	No Error
STATE v. RICE 2021-NCCOA-646 No. 21-154	Mecklenburg (07CRS249456)	AFFIRMED IN PART; DENIED IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. SANDERS 2021-NCCOA-647 No. 21-89	Wake (18CRS210299)	Affirmed
STATE v. SIMMONS 2021-NCCOA-648 No. 20-714	Surry (17CRS52306-08) (18CRS17)	No Error
STATE v. STURDIVANT 2021-NCCOA-649 No. 20-444	Onslow (17CRS51435) (17CRS51450) (19CRS211)	No Error
TOWN OF BLOWING ROCK v. CALDWELL CNTY. 2021-NCCOA-650 No. 20-834	Caldwell (19CVS285)	Affirmed

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